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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EASTSIDE MENTAL HEALTH CENTER, INC.,
Petitioner,
v.
DAVID R. WILLIAMS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Tenth Amendment to the United States Constitution, as construed and applied in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), prohibits application of the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 206 and 207, to employees of a nonprofit corporation created solely to provide, and which does provide, community mental health services within a comprehensive and integrated mental health system established and operated by the State of Alabama.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED . 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 8

I. THE DECISION BELOW FAILS TO FOLLOW THE DECISIONS OF THIS COURT 8

A. In Reaching Its Conclusion That FLSA Regulation Of Eastside Would Not Constitute Regulation Of The "State As State," The Court Of Appeals Failed To Follow The Decisions Of This Court 11

B. The Conclusion Of The Court Of Appeals That Provision Of Mental Health Services Does Not Constitute An Integral State Operation Conflicts With Decisions Of This Court 17

II. THE DECISION BELOW CONFLICTS WITH RECENT DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE FIRST, FIFTH AND SIXTH CIRCUITS 19

III. REVIEW AND REVERSAL BY THIS COURT IS NECESSARY TO PRESERVE STATE SOVEREIGNTY AND VIABILITY IN THE PROVISION OF PUBLIC MENTAL HEALTH SERVICES 21

A. The Issue Is Substantial 21

B. The Decision Below Could Seriously Jeopardize State Mental Health Systems 23

CONCLUSION 26

APPENDIX:

Court Of Appeals Denial Of Rehearing 1a

Court Of Appeals Opinion 3a

District Court Decisions And Orders 22a

Fair Labor Standards Act, 29 U.S.C. §§ 206 and 207 37a

Code of Alabama, Title 22, Chapter 51, §§ 1-14 .. 39a

Code of Alabama, Title 22, Chapter 50, § 17 ..... 50a

Table of Contents Continued

Page

Alabama Dept. of Mental Health, *Standards for Community Mental Health Centers* 51a

Letter from James A. Tucker, Area Director, Wage-Hour Division (February 23, 1977) 56a

Letter from James A. Tucker, Area Director, Wage-Hour Division (May 22, 1979) 57a

TABLE OF AUTHORITIES

CASES: Page

Alewine v. *City Council of Augusta, Ga.*, 505 F. Supp 880 (S.D. Ga. 1981), *appeal pending*, No. 81-790 (11th Cir.) 23

Amersbach v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979) 5, 6, 19, 20, 21

Dove v. *Chattanooga Area Regional Transp. Auth.*, 539 F. Supp 36 (E.D. Tenn. 1981), *appeal pending*, No. 81-5636 (6th Cir.) 23

Hodel v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981). 6, 10, 11, 12, 22

Joiner v. *City of Macon*, C.A. No. 79-287-MAC (M.D. Ga. April 27, 1981), *appeal pending*, No. 81-7780 (11th Cir.) 23

Kramer v. *New Castle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982) 20, 22

Maryland v. *Wirtz*, 392 U.S. 183 (1968) 9, 17, 18

Mills v. *Rogers*, 50 U.S.L.W. 4677 (U.S. June 18, 1982) 22

Molina—Estrada v. *Puerto Rico Highway Authority*, No. 81-1447, slip op. (1st Cir. June 8, 1982) 20

National League of Cities v. *Usery*, 426 U.S. 833 (1976) 5, 6, 7, 8, 9, 10, 11, 14, 17, 18, 19, 20, 21, 22, 25

NLRB v. *Highview, Inc.*, 590 F.2d 174 (5th Cir.), *vacated in part on other grounds*, 595 F.2d 339 (5th Cir. 1979) (per curiam) 6, 7, 16, 17, 21

NLRB v. *Natural Gas Utility District*, 402 U.S. 600 (1971) 13, 14, 15

Pennhurst State School & Hospital v. *Halderman*, 451 U.S. 1 (1981) 22

Richland County Association for Retarded Citizens v. *Marshall*, 86 Lab. Cas. (CCH) ¶ 33,799 (D. Mont. April 10, 1978), *rev'd*, 660 F.2d 388 (9th Cir. 1981), *vacated and appeal dismissed sub nom. Donovan* v. *Richland County Association for Retarded Citizens*, ___ U.S. ___, 102 S.Ct. 713 (1982) (per curiam) . 25

Page

San Antonio Metropolitan Area Transit Auth. v. *Donovan*, Civ. No. 5A-79-CA-457 (W.D. Tex. Nov. 17, 1981), *vacated and remanded*, No. 81-1728, ___ U.S. ___, 50 U.S.L.W. 3960 (June 8, 1982) 23

Schweiker v. *Wilson*, 450 U.S. 221 (1981) 22

United Transportation Union v. *Long Island Railroad Co.*, ___ U.S. ___, 102 S. Ct. 1349 (1982). . 10, 20, 22

Williams v. *Eastside Mental Health Center, Inc.*, 509 F. Supp. 579 (N.D. Ala. 1981) ... 2, 4, 5, 6, 11, 15, 20

Williams v. *Eastside Mental Health Center, Inc.*, 669 F.2d 671 (11th Cir. 1982) 1, 3, 4, 5, 7, 8, 11, 13, 14, 15, 16, 17, 18, 19, 24

Youngberg v. *Romeo*, 50 U.S.L.W. 4681 (U.S. June 18, 1982) 22

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. X 2, 9, 12, 14, 18, 21, 22, 23

STATUTES:

Fair Labor Standards Act
- 29 U.S.C. §§ 201-219 (1976) 4, 9
- 29 U.S.C. § 203(s)(5) (1976) 5
- 29 U.S.C. § 206 (1976 & Supp. IV 1980) 2, 5
- 29 U.S.C. § 207 (1976) 2, 5
- 29 U.S.C. § 216(b) (Supp. IV 1980) 5, 24

Judiciary and Judicial Procedure Act of 1948
- 28 U.S.C. § 1254(1) (1976) 2
- 28 U.S.C. § 1331 (Supp. IV 1980) 5

Alabama Code
- § 10-3-1 3
- § 22-50-17 (1975) 2
- §§ 22-5-1 to -14 (1975) 1, 2, 3

Table of Authorities Continued

Page

RULES AND REGULATIONS:

29 C.F.R. § 775.3(b) (1980) 18

MISCELLANEOUS:

Alabama Department of Mental Health, *Standards for Community Mental Health Centers* (1971) ... 2, 4, 16

Opinion Letter of Wage-Hour Administrator, No. 1545 (WH 492) (February 1, 1979) 18

Letter from James A. Tucker, Area Director, Wage-Hour Division (February 23, 1977) 4, 18

Letter from James A. Tucker, Area Director, Wage-Hour Division (May 22, 1979) 4, 18

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v.

DAVID R. WILLIAMS, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Eastside Mental Health Center, Inc. ("Eastside"),[1] respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on March 5, 1982. Rehearing and rehearing *en banc* were denied by the Court of Appeals on May 13, 1982.

OPINIONS BELOW

The opinion of the court below, reported at 669 F.2d 671 (11th Cir. 1982), is reproduced in the Appendix hereto, 3a-21a. The order denying rehearing and rehearing *en banc* is reproduced in the Appendix, 1a-2a. The April 10, 1980 "Final Order Granting Summary Judgment" of the United States District Court for the Northern District of Alabama with accompanying Memorandum Opinion, granting summary judgment for petitioner Eastside, and that court's March 24, 1981 Order and accompanying Memorandum Opinion denying respondent Williams' motion for reconsideration, reported together at 509 F. Supp. 579 (N.D. Ala. 1981), are reproduced in the Appendix, 22a-36a.

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[1] Eastside, a non-stock, nonprofit corporation, has neither parent nor subsidiary corporations, although, as explained more fully herein, Eastside is closely affiliated with, and operates under the comprehensive direction and control of, the Jefferson-Blount-St. Clair Mental Health/Mental Retardation Authority, an agency organized by the State of Alabama pursuant to Ala. Code §§ 22-51-1 to -14 (1975). Appendix, 39a-49a.

JURISDICTION

Judgment of the court below was entered on March 5, 1982. Petitioner timely filed a Petition for Rehearing and Suggestion For Rehearing *En Banc*, which the court below denied on May 13, 1982. Appendix, 1a-2a. This Petition for Writ of Certiorari has been filed within ninety days of the May 13, 1982 denial of rehearing and rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Tenth Amendment to the United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Pertinent portions of the Fair Labor Standards Act, 29 U.S.C. § 206 (1976 & Supp. IV 1980) and § 207 (1976); Alabama Code §§ 22-50-17 (1975), and 22-51-1 to -14 (1975); and the ***Standards For Community Mental Health Centers*** adopted and utilized by the Alabama Department of Mental Health, are set forth in the Appendix, 37a-55a.

STATEMENT OF THE CASE

The petitioner herein is Eastside Mental Health Center, Inc., a nonprofit, tax-exempt Alabama corporation created in 1975 to continue the provision of community mental health services on a local basis within the mental health system of the State of Alabama. The corporation has continued, without change, the services of the Eastside Mental Health Center, which had been originally established in 1974 as an unincorporated service unit owned and operated wholly by the Jefferson-Blount-St. Clair [Counties] Mental Health/Mental Retardation Authority ("Jefferson Authority"). The Jefferson Authority is a regional agency established by the State of Alabama in 1969 to provide and to coordinate comprehensive, community-based mental health services within three counties, as part of an overall restructuring and decentralization of such services by the State, pursuant to 1967 legislation formerly known as "Act 310," Ala. Code §§ 22-51-1 to -14 (1975) (Appendix, 39a-49a). 669 F.2d at 673-74; Appendix, 5a-7a.

Solely to avoid allegations of purported "conflict of interest" in the disbursement of State funds within its region, the Jefferson Authority incorporated Eastside in 1975 as a separate, nonprofit corporation. 669 F.2d at 674; Appendix, 6a. Because the State limited the number of Act 310 corporations that could exist and receive funds thereunder within the Jefferson Authority's region, Eastside was incorporated under Alabama's general nonprofit corporation statute, Ala. Code § 10-3-1 (1975), rather than under Act 310. 669 F.2d at 673-74; Appendix, 6a. However, the Jefferson Authority, and the State of

Alabama, retain comprehensive, detailed and final control over Eastside's structure, operations, programs, employees, services, budget and funding. *See* Ala. Dept. of Mental Health, *Standards For Community Mental Health Centers*, Appendix, 51a-55a. Eastside's employment policies and practices continue to be tightly controlled by the State, and Eastside is a member of, and its employees are covered by, the State retirement and pension system. 509 F. Supp. at 581, 583-84; Appendix, 27a-28a, 35a.

Eastside provides inpatient and outpatient care, emergency care, consultation and educational services, and specialized services for children, adults, the elderly and persons with alcohol or drug-related problems. It also runs a Transitional Home Program for persons entering or leaving state hospitals, and it assists the local probate court in screening persons for state institutions. 669 F.2d at 675; Appendix, 8a.

In February 1977, and May 1979, Eastside received copies of letters from the federal Wage-Hour Area Director stating that employees of Alabama's community mental health centers, including "transitional home managers" such as respondent Williams, were providing traditional state services and thus were *not* subject to the requirements of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219 (1976). *See* Appendix, 56a, 57a. Relying on those letters, Eastside and the State's 24 other centers established work schedules and paid their employees, including respondent Williams, assuming that the centers were immune from application of the detailed FLSA wage-hour regulations enforced by the federal Wage-Hour Division.

Respondent Williams was hired by Eastside effective February 1, 1977, and worked in Eastside's Transitional

Home Program as a live-in home manager, overseeing residents' training in basic socialization skills and routine activities. 669 F.2d at 672-73; Appendix, 4a. Williams resigned his position at Eastside on May 8, 1979, and promptly thereafter brought suit against Eastside in the United States District Court for the Northern District of Alabama, seeking an award of back pay. Jurisdiction lay in that court under 29 U.S.C. § 216(b) (Supp. IV 1980) and 28 U.S.C. § 1331 (Supp. IV 1980). The basis of Williams' claim was that Eastside is subject to FLSA requirements as a private "enterprise" covered by FLSA Section 203(s)(5), 29 U.S.C. § 203(s)(5), and that Eastside had violated the FLSA's minimum wage and overtime provisions, 29 U.S.C. §§ 206 and 207. 509 F. Supp. at 580; Appendix, 33a.

Following initial discovery, Williams moved for partial summary judgment on liability. 509 F. Supp. at 580-81; Appendix, 23a-24a, 33a. Eastside cross-moved for summary judgment, asserting essentially that it is not a covered private "enterprise," but rather a public entity constitutionally immune from FLSA regulation under *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). 509 F. Supp. at 580-81, 582-83; Appendix, 24a, 33a.

On April 10, 1980, the District Court denied Williams' motion for partial summary judgment and granted Eastside's cross-motion, ruling (1) that Eastside is a "public" corporation rather than a private "enterprise"; (2) that Eastside performs an integral, traditional governmental function by providing community mental health services within a comprehensive state system;[2] and (3) that Eastside is therefore exempt from FLSA compliance under *National League of Cities*. 509 F. Supp. at 581; Appendix, 35a-36a.

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[2] The District Court relied upon the four-part test for "integral" governmental services set forth in *Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979), where the Sixth Circuit held that municipal airport employees were not covered by FLSA under *National League of Cities*. *See infra*, p. 20.

Williams thereupon moved the District Court for reconsideration, arguing in part that Eastside is not a "political subdivision" under a two-part test utilized in decisions delineating National Labor Relations Board ("NLRB") jurisdiction, including *NLRB* v. *Highview, Inc.*, 590 F.2d 174 (5th Cir.), *vacated in part on other grounds*, 595 F.2d 339 (5th Cir. 1979) (per curiam). 509 F. Supp. at 582; Appendix, 25a-26a. The United States Department of Labor filed a brief *amicus curiae* in the District Court supporting reconsideration. The District Court reopened the case and permitted additional discovery regarding Eastside's nature and functions. 509 F. Supp. at 581; Appendix, 23a.

On March 24, 1981, the District Court denied reconsideration and reaffirmed its prior judgment, holding (1) that, utilizing the four-part *Amersbach* test, Eastside provides an "integral" government service; and (2) that Eastside is thus exempt from FLSA compliance, under *National League of Cities*. While stressing that utilization of the *Highview* "political subdivision" test was, in its view, neither appropriate nor necessary, the District Court held, alternatively, that Eastside also meets that test, since, under part two of the test, Eastside's administrative board members are responsible to public officials. 509 F. Supp. at 583-84; Appendix, 28a.

On appeal,[3] the Eleventh Circuit reversed. The court stated that *Hodel* v. *Virginia Surface Mining &*

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[3] In the Court of Appeals, the State of Alabama briefed and argued as *amicus curiae* for Eastside; the United States Department of Labor briefed and argued as *amicus curiae* for Williams.

Reclamation Association, Inc., 452 U.S. 264 (1981), had interpreted *National League of Cities* "as requiring that, *inter alia*, the federal regulation in question must address the 'States as States' in order that there be an infringement of state sovereignty"; and thus that *National League of Cities* assertedly involves "only the payment of wages by *state or subordinate political bodies.*" 669 F.2d at 677; Appendix, 12a-13a (emphasis in original). To apply these principles, the court below considered that "the relevant inquiry is the extent of control the states maintain over the activities and administration of the entity in question." 669 F.2d at 677: Appendix, 13a. The court then concluded that Eastside could avoid FLSA compliance only if it were a "political subdivision."

To determine whether Eastside is a "political subdivision," the Court of Appeals used the two-part NLRB jurisdiction test[4] employed in decisions such as *Highview*, *supra*, noting:

> Although these [NLRB] cases turn on the construction of the Labor Relations Act and not on constitutional considerations of state sovereignty, we find them helpful in our inquiry, and *until the* [Supreme] *Court holds otherwise* we will adopt this approach.

669 F.2d at 677; Appendix, 13a (emphasis added). While acknowledging the "borderline nature of the facts," 669 F.2d at 678; Appendix, 15a, the court, focusing primarily on the NLRB test's second part, concluded that Eastside is not a "political subdivision" since its administrative board members are not, in the court's view, sufficiently

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[4] The court based its "analogy to the labor cases on the simple fact that the precise term 'political subdivision' is used in both the *Usery* case and the NLRB cases." 669 F.2d at 677, n.8; Appendix, 13a, n.8.

responsible to state officials or voters, even though public agencies appoint a majority of them, and "the Jefferson Authority must ratify the appointment of all board members, including those appointed by private organizations." 669 F.2d at 674; Appendix, 7a. *See* 669 F.2d at 679; Appendix, 17a.[5]

In addition, the court below stated that, even if Eastside were a "political subdivision," it performs no "integral" state function, and thus is not protected by *National League of Cities*. Defining "integral function" as "one that a state performs for or in relation to the society at large, the state as a whole," 669 F.2d at 680; Appendix, 19a, the court concluded that "Eastside's function of providing mental health services to the citizens of Alabama is not an integral [state] function. . . ." 669 F.2d at 680-81; Appendix, 20a.[6]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW FAILS TO FOLLOW THE DECISIONS OF THIS COURT.

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court considered and resolved the conflict between the interests of state sovereignty embodied in the Tenth Amendment and Congress' plenary power under the Commerce Clause to regulate state activities, in the particular context of the application to state employees of the very FLSA[7] minimum wage and maximum hour provisions involved herein. In overruling *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), which had upheld the constitutionality of those FLSA provisions as applied to state school and hospital employees, and in declaring the provisions unconstitutional as applied to state police and fire employees, this Court held in *National League of Cities* that:

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[5] Essentially, the court dismissed the State's pervasive control over Eastside's structure, operations and employees as simply "stringent licensing standards." 669 F.2d at 679; Appendix, 17a.

[6] Eastside sought rehearing and rehearing *en banc*. Considering its entire mental health system jeopardized by the Court of Appeals' statement that provision of mental health services does not constitute an "integral" state function, *see infra* p. 17, the State of Alabama sought intervention, rehearing, and rehearing *en banc*. Intervention was denied and, on May 13, 1982, rehearing and rehearing *en banc* were denied. Appendix, 1a-2a. The Eleventh Circuit stayed its Mandate until August 5, 1982, pending the filing of this petition for writ of certiorari.

> the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In doing so, Congress has sought to wield its power in a fashion that would impair the States' "ability to function effectively in a federal system." This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. *We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.*

426 U.S. at 852 (emphasis added; citation and footnote omitted).

In two more recent decisions, this Court has articulated a flexible three-part test for determining whether the Tenth Amendment precludes application to the

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[7] 29 U.S.C. §§ 201-219 (1976).

States of federal Commerce Clause legislation under the *National League of Cities* rationale:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. *First*, there must be a showing that the challenged regulation regulates the "States as States." *Second*, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And *third*, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

United Transportation Union v. *Long Island Railroad Co.*, ___ U.S. ___, 102 S. Ct. 1349, 1353 (1982) (emphasis added; citations and footnotes omitted) (*quoting Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 287-288 (1981)).

The Court of Appeals misconstrued and misapplied this tripartite test's first requirement in reaching its conclusion that application of the FLSA to Eastside would not affect the State of Alabama *qua* State. And in concluding that the provision of comprehensive mental health services to all citizens of Alabama is not an integral state operation, the court also misconstrued and misapplied the test's third requirement. These failures of the court to follow *National League of Cities* and its progeny warrant full review and reversal by this Court.

A. In Reaching Its Conclusion That FLSA Regulation Of Eastside Would Not Constitute Regulation Of The "State As State," The Court Of Appeals Failed To Follow The Decisions Of This Court.

As the District Court in this case properly concluded, under the *National League of Cities* "State as State" inquiry:

> the main issue is whether the defendant provides a traditional government service, *not merely* whether or not it is a political subdivision or public corporation.

509 F. Supp. at 583; Appendix, 27a (emphasis added). That is, a court adjudicating a constitutional challenge to federal regulation under *National League of Cities* should not treat the first part of the three-part test as an isolated threshold determination. Rather, it should go beyond the form and examine the *function* of the entity seeking FLSA immunity. While the form of the entity is relevant, it should rarely be dispositive of the constitutional issue.

The Court of Appeals, however, incorrectly interposed and utilized an unduly narrow and formalistic "political subdivision" subtest to reach its conclusion that FLSA regulation of Eastside would not constitute regulation of the "State as State" within the first part of the *National League of Cities* tripartite test. 669 F.2d at 678; Appendix, 15a.

The vice of engrafting an additional, formalistic, threshold requirement onto the *National League of Cities* inquiry is clear: the principal focus then becomes the mere superficial *form* of the entity being regulated, not whether federal regulation directly impairs a state's ability "to structure integral operations in areas of traditional functions." *Hodel*, 452 U.S. at 287-88. Such an approach can generate wholly arbitrary and unwarranted results, as it did in this case where the mere fortuity of Eastside's incorporation under Alabama's general nonprofit incorporation statute (because the per-county quota of "Act 310 corporations" was full) assertedly removed Eastside from the threshold "political subdivision" category, in the Eleventh Circuit's view. Yet that "private" corporate form is the only arguably "non-public" aspect of Eastside's nature and functions, which are in all other salient respects indistinguishable from those of the "public corporations" providing the same mental health services to Alabama's citizens.

Neither this Court nor any other court has interposed such a threshold, arbitrary "political subdivision" inquiry in Tenth Amendment determinations. Indeed, such an approach conflicts directly with this Court's more reasoned, in-depth approach utilized in *Hodel*. In that case, the entities seeking constitutional immunity were unquestionably *private* coal mine operators, yet no threshold "political subdivision" inquiry prevented the Court from going further into a careful analysis of the impact of federal surface mining regulation on the State's sovereignty. By contrast, under the Eleventh Circuit's view, this Court in *Hodel* would never have gone beyond the simple, formalistic determination that the private coal mine operators were not "political subdivisions," and thus the basic issue of federalism involved therein would never have been reached.

Tenth Amendment inquiries are not, and should not be, simple and formalistic, as this Court has recognized. Yet the Eleventh Circuit has reduced the inquiry here to just such a level—an error compounded by its selection and use of the two-part NLRB subtest.

In attempting to explain its choice of this subtest, the Court stated:

> [W]e think the relevant inquiry is the extent of control the states maintain over the activities and administration of the entity in question. Indeed it seems to us appropriate to borrow from principles established by the court in NLRB cases involving the issue of whether a particular entity is a political subdivision and is therefore exempt from the provisions of the National Labor Relations Act, 29 U.S.C.A. § 152(2) (1973). *See NLRB* v. *Natural Gas Utility Dist.*, 402 U.S. 600, 91 S. Ct. 1746, 29 L.Ed.2d 206 (1971). In *NLRB* v. *Natural Gas*, the Court in a close case considered relevant whether the entity seeking exemption was administered by individuals responsible to public officials or to the general electorate. *Although these cases turn on the construction of the Labor Relations Act and not on constitutional considerations of state sovereignty, we find them helpful in our inquiry, and until the Court holds otherwise we will adopt this approach.*

669 F.2d at 677; Appendix, 13a (emphasis added; citation and footnote omitted). Thus the court, in resolving a fundamental challenge to the constitutionality of the FLSA, selected and applied a statutory construction subtest, which had been previously used only to determine an unrelated federal agency's jurisdiction under a totally different statute (the NLRA).

As this Court stated in *NLRB* v. *Natural Gas Utility District*, 402 U.S. 600 (1971), relied upon by the court below:

> The term "political subdivision" is not defined in the [National Labor Relations] Act and the Act's legislative history does not disclose that Congress explicit-

> ly considered its meaning. The legislative history does reveal, however, that Congress enacted the § 2(2) exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, *since governmental employees did not usually enjoy the right to strike.*

402 U.S. at 604 (emphasis added; footnote omitted). This distinction regarding the right to strike obviously provides no rationale for use of the NLRB subtest in Tenth Amendment determinations, where fundamental issues of intergovernmental immunity—not the NLRB's lack of jurisdiction over certain employers—are involved.

The Eleventh Circuit's stated rationale for selecting the NLRB subtest was as follows:

> We base our analogy to the labor cases on the simple fact that the precise term "political subdivision" is used in both the *Usery* case and the NLRB cases.

669 F.2d at 677, n.8; Appendix, 13a, n.8. But the mere appearance of the words "political subdivision" in both *National League of Cities* and unrelated NLRB cases provides no reasoned rationale for selection of the NLRB subtest. In short, the Eleventh Circuit provided no rationale for its use of this subtest.

In any event, even if the NLRB subtest had any validity in this context, the Eleventh Circuit failed to properly apply either of the alternative parts of that subtest to Eastside. Under *NLRB* v. *Natural Gas Utility District*, a "political subdivision" is an entity " '*either* (1) created directly by the state, so as to constitute departments or administrative arms of the government, *or* (2) administered by individuals who are responsible to public officials or to the general electorate.' " 402 U.S. at 604-05 (emphasis added) (*quoting* NLRB's brief).

The opinion of the court below simply sidesteps the first alternative part of this subtest. The record is clear that Eastside was created *by the Jefferson Authority*, unquestionably an administrative arm of the State of Alabama, solely to provide mental health services on behalf of the State. 669 F.2d at 673-74; Appendix, 6a. Having been created by an Alabama agency for this purpose, Eastside was in substance created by the State of Alabama itself. Indeed, the court below conceded this fact,[8] yet ultimately concluded that Eastside fails the NLRB subtest. Had the first alternative part of that subtest been properly applied, the conclusion would undoubtedly have followed that Eastside was "created directly by the State" and is an administrative arm thereof. *Natural Gas*, 402 U.S. at 604.

As to the second alternative part of the NLRB subtest, the Court of Appeals reversed the District Court's holding that:

> The extent of state control and accountability of defendant's [Eastside's] administrators to state agencies and public officials renders it a political subdivision under part two of the *Highview* [*i.e.*, *Natural Gas*] test.

509 F. Supp. at 584; Appendix, 28a-29a. In so doing, the Court of Appeals adopted the extraordinarily restrictive view that, because the State "has no power whatsoever to *dismiss* any of the board appointments," 669 F.2d at 679; Appendix, 17a (emphasis added), Eastside's administra-

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[8] "For whatever reason, Alabama did not elect to operate Eastside as a state institution with state employees; instead *it set up* a not for profit corporation with a separate, independent board of directors to administer it." 669 F.2d at 678; Appendix 15a (emphasis added).

tive board is assertedly not "directly responsible to a public official or to the general electorate." *Id.*

However, the court apparently dismissed or disregarded the facts that (1) a majority of Eastside's board members are appointed by State agencies (with the remaining minority appointed by nonprofit, public-interest entities), 669 F.2d at 674, n.4; Appendix, 7a, n.4; that (2) "the Jefferson Authority must *ratify* the appointment of *all* board members, including those appointed by private organizations," 669 F.2d at 674; Appendix, 7a (emphasis added); and that (3) Eastside's board members are, as the District Court correctly concluded, completely "responsible" to Alabama public officials through close regulation, control, audits, and budget oversight by the Jefferson Authority, applying Alabama's comprehensive *Standards For Community Mental Health Centers*, Appendix, 51a-55a. Given this pervasive regulation and control by the State, the Court of Appeals' particularized reliance upon the Jefferson Authority's mere inability to *remove* board members it originally ratified cannot justify the court's conclusion that Eastside's board was not "responsible to a public official." 669 F.2d at 679; Appendix, 17a.

Finally, the court also overlooked the "supplier" exception to the NLRB subtest articulated in *NLRB* v. *Highview, Inc.*, 590 F.2d 174 (5th Cir.), *vacated in part on other grounds*, 595 F.2d 339 (5th Cir. 1979) (per curiam), decided prior to the division of the Fifth and Eleventh Circuits. There, considering a nonprofit nursing home's assertion of NLRA immunity, the Fifth Circuit noted that:

> the Board [NLRB] will decline to assert jurisdiction over an employer if it *supplies an exempt institution*

> *with services that are an essential attribute of the purpose of the exempt institution.*

590 F.2d at 178 (emphasis added). Properly applying this "supplier" exception to the NLRB subtest, Eastside could only be deemed immune from FLSA coverage because it supplies mental health services for the Jefferson Authority and to the State of Alabama and its citizens.

B. The Conclusion Of The Court Of Appeals That Provision Of Mental Health Services Does Not Constitute An Integral State Operation Conflicts With Decisions Of This Court.

The Court of Appeals concluded that, "even if the State of Alabama had chosen to operate Eastside as a state agency, the Center is not performing an 'integral' function and thus the *Usery* exemption would not apply." 669 F.2d at 680; Appendix, 18a. This conclusion, that provision of mental health services is not within the scope of "public health" activities immune from FLSA regulation, conflicts directly with *National League of Cities*.

In overruling *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), which had upheld the constitutionality of extension of FLSA coverage to employees of state schools, hospitals and similar facilities, *National League of Cities* stated unequivocally that:

> *public health* . . . [is an activity] typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services.

426 U.S. at 851 (emphasis added; footnote omitted). Therefore, this Court concluded that FLSA regulation of state "public health" activities would be presumptively unconstitutional, where it would "significantly alter or displace the States' abilities to structure employer-employee relationships in such areas." 426 U.S. at 851.

Until recently, the Labor Department has not contended that provision of mental health services falls outside "public health" activities immunized from FLSA coverage by *National League of Cities*. *See* 29 C.F.R. § 775.3(b) (1980). Indeed, the Government indicated consistently that "public health" includes "mental health." *See* Opinion Letter of Wage-Hour Administrator, No. 1545 (WH-492), Feb. 1, 1979 (county hospital for mentally retarded serves traditional governmental function); letters of James A. Tucker, Area Director, Wage-Hour Division, February 23, 1977, and May 22, 1979, Appendix, 56a, 57a (Alabama community mental health centers immune from FLSA regulation under *National League of Cities*).

Thus, the Eleventh Circuit's unprecedented conclusion that "mental health" is excluded from "public health" for Tenth Amendment purposes—and the resulting virtual resurrection of *Maryland* v. *Wirtz*—conflicts directly with *National League of Cities*.

Even if some reasoned distinction between "mental health" and "public health" could be suggested in the abstract, the Eleventh Circuit has created, out of whole cloth, a novel and inappropriate subtest—which can only be described as a "100% impact" subtest—to resolve the "integral operation" issue in this context. For the court, a state operation is not "integral" unless it "relate[s] to the *entire state populace*" or "produce[s] significant consequences affecting *all persons* in the state." 669 F.2d at 680; Appendix, 19a (emphasis added).

But there is nothing in *National League of Cities* supporting imposition of such a novel subtest. Moreover, it does not, in fact, justify any distinction between "public health" services and "mental health" services. Even if "public health" could be interpreted as being limited to "*physical* health"—an interpretation without support in *National League of Cities* or elsewhere—obviously *both* physical *and* mental health services can benefit a state's entire citizenry, and the effects of both "reverberate throughout the society as a whole." 669 F.2d at 680; Appendix, 19a. Certainly all persons do not demand or receive either physical or mental health services at any given moment, but all persons could potentially benefit from both. Moreover, no modern society could function without either. Thus, even applying a "100% impact" subtest, the result reached by the court is unjustified and unsupportable.

In sum, the ruling below that mental health services do not fall within the scope of "public health" activities immune from FLSA regulation directly conflicts with *National League of Cities* and thus warrants review and reversal by this Court.

II. THE DECISION BELOW CONFLICTS WITH RECENT DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE FIRST, FIFTH AND SIXTH CIRCUITS.

The Eleventh Circuit's unprecedented creation and application of its "100% impact" subtest for determining an "integral state operation" further conflicts directly with several recent Courts of Appeals decisions, including that of the United States Court of Appeals for the Sixth Circuit in *Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979). There, the court utilized a flexible four-part subtest to conclude that municipal airport employees were performing "integral" and "traditional" state functions, and thus were immune from FLSA regulation under *National League of Cities*. The Sixth Circuit stated:

> By analyzing the services and activities which the [Supreme] Court characterized [in *National League of Cities*] as typical of those performed by governments, we note certain elements common to each which serve to clarify and define a method by which a protected government function may be identified. Among these elements are: (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a communitywide need for the service or activity.

598 F.2d at 1037. This well-reasoned four-part "integral function" subtest, employed by the District Court herein, 509 F. Supp. at 580-81, 583; Appendix, 26a-28a, 34a-35a, was approved and utilized recently by the United States Court of Appeals for the First Circuit in *Molina-Estrada* v. *Puerto Rico Highway Authority*, No. 81-1447, slip op. at 8-9 (1st Cir. June 8, 1982). However, this approach was either completely ignored or rejected *sub silentio* by the Eleventh Circuit. Indeed, neither *Amersbach* nor its thoughtful four-part subtest is mentioned in the opinion below.[9]

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[9] Alternatively, the court might have adopted (but did not adopt) the "historical" approach utilized recently in *Kramer* v. *New Castle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), which followed this Court's somewhat similar approach in *Long Island Railroad*, ___ U.S. ___, 102 S.Ct. 1349 (1982).

The decision below also conflicts with the Fifth Circuit's ruling in *NLRB* v. *Highview, Inc.*, *supra* (relied upon heavily by respondent and the Labor Department below for adoption of the two-part NLRB "political subdivision" subtest). There, on the "integral state operation" issue, the Fifth Circuit, citing *National League of Cities*, stated:

> We wholeheartedly agree with Highview that the care of the aged, the sick, and the indigent is a traditional function of government . . . . Certainly, no one moderately aware of our history, our traditions, and our ideals can argue that this care is not a 'traditional' function of government.

590 F.2d at 178. The Fifth Circuit thus concluded that a nonprofit nursing home—similar to a community-based residential mental health center such as Eastside—was providing an "essential" and "traditional" governmental function. *Id.* But as with *Amersbach*, the court below failed to mention *Highview* in its opinion, even on the "political subdivision" issue.

The court's improper creation and application of the "100% impact" subtest to determine an "integral state operation" thus conflicts with the recent decisions of three other Courts of Appeals, and therefore warrants review and reversal by this Court.

III. REVIEW AND REVERSAL BY THIS COURT IS NECESSARY TO PRESERVE STATE SOVEREIGNTY AND VIABILITY IN THE PROVISION OF PUBLIC MENTAL HEALTH SERVICES.

A. The Issue Is Substantial.

The Tenth Amendment protects state sovereignty from abrogation by Congress' exercise of its Commerce power. In *National League of Cities* this Court stressed the importance of this protection:

> We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.

426 U.S. at 845. This Court's continuing interest in resolving the conflict between the Tenth Amendment and the Commerce power—and thus in delineating the scope of *National League of Cities*—has been indicated recently in *Hodel* and *Long Island Railroad*. These recent decisions indicate an evolutionary approach to interpreting *National League of Cities*. By contrast, the ruling below could have the deleterious effect of arresting, if not reversing, that evolution and "virtually restrict[ing] the rule of *National League of Cities* to the particular and peculiar facts of that case." *Kramer* v. *New Castle Area Transit Auth.*, 677 F.2d 308, 311 (3d Cir. 1982) (Garth, J., concurring) (citation omitted).

Continuing resolution of this intraconstitutional conflict, and further delineation of *National League of Cities'* scope, would be particularly appropriate here, in light of this Court's particular sensitivity to the States' preeminence and presumed autonomy regarding mental health treatment. *See, e.g., Youngberg* v. *Romeo*, 50 U.S.L.W. 4681 (U.S. June 18, 1982); *Mills* v. *Rogers*, 50 U.S.L.W. 4677 (U.S. June 18, 1982); *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981); *Schweiker* v. *Wilson*, 450 U.S. 221 (1981).

Guidance from this Court now regarding the proper tests and subtests to be applied under *National League of*

Cities would be especially timely in view of the many cases pending in the lower courts in which similar Tenth Amendment issues have been raised.[10]

B. The Decision Below Could Seriously Jeopardize State Mental Health Systems.

In the District Court the parties assumed and never questioned that provision of mental health services constitutes an integral state operation. Thus, the Eleventh Circuit's contrary ruling below on that issue was as unanticipated as it is unprecedented and unsound. Because that ruling directly jeopardized Alabama's entire mental health system, the State immediately sought to intervene in the Court of Appeals as a party, and to obtain a rehearing *en banc*. The State argued in its March 22, 1982 Motion To Intervene that "the opinion issued by the Court of Appeals in this case has acted to deal a serious blow to the ability of the [State] Department [of Mental Health] to discharge [its] responsibility" to provide mental health services to Alabama citizens. State of Alabama Motion to Intervene at 7. However, the Eleventh Circuit denied both intervention and rehearing.

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[10] *See, e.g., San Antonio Metropolitan Area Transit Auth.* v. *Donovan*, Civ. No. 5A-79-CA-457 (W.D. Tex. Nov. 17, 1981), *vacated and remanded*, No. 81-1728, ____ U.S. ____, 50 U.S.L.W. 3960 (June 8, 1982); *Alewine* v. *City Council of Augusta, Ga.*, 505 F. Supp. 880 (S.D. Ga. 1981), *appeal pending*, No. 81-790 (11th Cir.); *Dove* v. *Chattanooga Area Regional Transp. Auth.*, 539 F. Supp. 36 (E.D. Tenn. 1981), *appeal pending*, No. 81-5636 (6th Cir.); *Joiner* v. *City of Macon*, C.A. No. 79-287-MAC (M.D. Ga. April 27, 1981), *appeal pending*, No. 81-7780 (11th Cir.)

The court below has itself indicated the extent of this "serious blow":

> Assuming the facts as alleged by the plaintiff [respondent Williams], the salary [he] received during his entire employment at Eastside was about $27,000 short of the minimum required under the FLSA.

669 F.2d at 673; Appendix, 4a. Thus, even if the court below had limited its ruling to Eastside—thereby restricting it to the three non-Act-310 corporations among the 25 mental health centers comprising the Alabama system—the State would bear a substantial economic burden.[11] This unanticipated financial burden could become staggering due to the ruling below that *none* of the State's 25 mental health centers is immune from FLSA regulation, because none assertedly performs an "integral" state "public health" operation.

In addition to this potentially enormous unbudgeted and unfunded back-pay liability, the State would face several equally unpalatable choices—among them increasing taxes, seeking increased federal assistance (which is, however, steadily declining), or sacrificing other social service programs—in order to maintain present mental health services in its centers. Otherwise, the quality and quantity of such services would inevitably decrease.[12]

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[11] Each center has two home managers. If the amount allegedly owed Williams is representative, and if all managers worked two years (like Williams), back wages due from three centers would total *$162,000*. That amount could be doubled under the FLSA's liquidated damages provision, 29 U.S.C. § 216(b). The State has calculated that its total potential (unliquidated) liability for mental health employees in *all* 25 centers would exceed $700,000.

Having considered a similar potentially ruinous financial burden upon state fire and police agencies, this Court stated in *National League of Cities*:

> Quite apart from the substantial costs imposed upon the States and their political subdivisions, the [FLSA] displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require . . . . [I]t cannot be gainsaid that the federal requirement directly supplants the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment.

426 U.S. at 847-48. The decision below similarly abrogates a specific attribute of Alabama's sovereignty: the right to choose the levels of quality and quantity of state mental health care, the manner of delivering such care to

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[12] Equally ruinous consequences could ensue in other states with similar decentralized mental health systems. This Court has already addressed one such situation, although, for procedural reasons, the Court did not reach the merits. In *Richland County Association for Retarded Citizens* v. *Marshall*, 86 Lab. Cas. (CCH) ¶ 33, 799 (D. Mont. April 10, 1978), the District Court immunized an admittedly "private" mental health center from FLSA regulation. The Ninth Circuit initially affirmed. After the Secretary of Labor noted an appeal to this Court and filed a jurisdictional statement, the Ninth Circuit withdrew its affirmance and issued a new opinion reversing the District Court. 660 F.2d 388 (9th Cir. 1981). This Court subsequently held that the Court of Appeals lacked jurisdiction of the case. The judgment and opinion of the Court of Appeals were vacated accordingly. ____ U.S. ____, 102 S.Ct. 713 (1982) (per curiam) (*sub nom. Donovan* v. *Richland County*). The District Court's ruling was thus left intact.

Alabama citizens, and the wage and hour policies applicable to employees providing such care—all free from an overwhelming, federally-imposed economic burden.

CONCLUSION

For these reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7284

DAVID R. WILLIAMS,
Plaintiff-Appellant,
v.
EASTSIDE MENTAL HEALTH CENTER, INC.,
a corporation,
Defendant-Appellee.

Appeal From The United States District Court
For The Northern District Of Alabama

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 5, 1982, 11 Cir., 198__, ___F.2d___).

Filed
May 13 1982

Before: TUTTLE, HILL and JOHNSON, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
JAMES C. HILL
United States Circuit Judge

DAVID R. WILLIAMS,
Plaintiff-Appellant,
v.
EASTSIDE MENTAL HEALTH CENTER, INC.,
a corporation,
Defendant-Appellee.

No. 81-7284

**United States Court Of Appeals,
Eleventh Circuit.**

March 5, 1982.

Reeves & Still, Edward Still, Birmingham, Ala., for plaintiff-appellant.

Beate Bloch, Associate Sol., Gregory O'Duden, Atty., U.S. Dept. of Labor, Div. of Fair Labor Standards, Washington, D.C., for Secretary of Labor amicus curiae.

Frank O. Hansen, Jr., Birmingham, Ala., for defendant-appellee.

J. Fairly McDonald, III, Asst. Atty. Gen., Ala. Dept. of Mental Health, Montgomery, Ala. for Ala. Dept. of Mental Health amicus curiae.

Before TUTTLE, HILL and JOHNSON, Circuit Judges.

TUTTLE, Circuit Judge:

This appeal involves a suit brought by the plaintiff-appellant against his employer for an award of back pay allegedly owed pursuant to the minimum wage provisions of the Fair Labor Standards Act [FLSA], 29 U.S.C.A. § 206 (1978). The district court, 509 F. Supp. 579, held that under the principles set out in *National League of Cities* v. *Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), the defendant-appellee was exempt from the FLSA's minimum wage provisions. For the reasons that follow, we reverse.

I.

The plaintiff David R. Williams was an employee at the Eastside Mental Health Center [Eastside] from February, 1977 until May, 1979. Williams worked in Eastside's Transitional Home Program. This program operates as a type of halfway house, providing psychological rehabilitation services for individuals recently released from state mental hospitals or persons who might otherwise be heading for commitment to a state mental hospital. Eastside hired Williams as a live-in home manager. He was required to work in 96-hour shifts, residing at the home for four days, followed by four days off. Eastside paid Williams a fixed salary, and considered him to be on duty 24 hours per day for the four working days. In fact he was required to be at the home during the four working days only from 5 p.m. until 8 a.m. the following morning. During the day he was allowed to leave the home if he was not needed. As a home manager Williams' primary function was to oversee and assist the training of residents in basic socialization skills and some routine daily activities.

Sections 206 and 207 of the FLSA require all employers subject to the Act to pay employees a certain minimum wage for the first 40 hours worked in a given week, and one and one-half times the regular wage for any time worked over the 40-hour base. *See* 29 U.S.C.A. §§ 206, 207 (1978). There is some dispute in the record from the court below regarding the number of hours Williams worked during his employment at Eastside. Assuming the facts as alleged by the plaintiff, the losing party in the district court's summary judgment order, the salary Williams received during his entire employment at Eastside was about $27,000 short of the minimum required under the FLSA.

II.

We must begin by describing the development and character of the defendant-appellee in this case, the Eastside Mental

Health Center.[1] The state of Alabama first began treating mental patients in its state hospitals in 1861. Up through the 1960's Alabama provided comprehensive mental health services in state institutions such as Bryce Hospital, Searcy Hospital, and Partlow State School. In addition the state helped fund some smaller community mental health centers.

In 1965 the State Department of Public Health completed a two-year, federally financed study to plan for statewide provision of mental health services. This study recommended the establishment of a network of smaller, but comprehensive mental health centers throughout the state. Subsequently the state passed legislation creating the Department of Mental Health [the Department], *see* Ala.Code § 22-50-1 (1977), and enacted specific legislation to govern the creation and operation of regional authorities to administer a network of community mental health centers. *See* Ala.Code § 22-51-1 (1977). All boards and corporations established pursuant to the provisions of this Act are statutorily designated as public corporations. Ala.Code § 22-51-2 (1977). The Department then divided the state into mental health regions, and established mental health authorities under section 22-51-2 to organize and administer the provision of services for each region.

In 1969 the Jefferson-Blount-St. Clair Mental Health Authority [hereinafter "the Authority" or "the Jefferson Authority"] was incorporated as a public corporation under section 22-51-2 as the Authority for coordinating mental health services in the three named counties. The Authority divided its region into four catchment areas each with a population of roughly 185,000 persons, and determined that adequate services could be provided if there were established one comprehensive mental health center in each catchment area. Three such centers were in fact created, one of which was Eastside

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[1] For reasons that are made clear below, see pp. 676-678 *infra*, the issue of state sovereignty upon which the case turns requires a consideration of the nature of the entity claiming sovereignty, as well as the nature of its chief functions.

Mental Health Center, the defendant-appellee in this case. The other two were the Western Mental Health Center and the University Mental Health Center. These latter centers were established as public corporations under section 22-51-2.

Eastside opened its doors as a community mental health center on July 15, 1974. It operated out of a building purchased with state, county and city funds. Unlike its counterpart centers operating within the three-county region, Eastside was initially opened as an unincorporated service unit for the Jefferson Authority wholly owned and operated by the Authority. The Western and University Centers subsequently lodged a complaint that there was a conflict of interest in the Authority operating a center that was competing for funds with the other two centers.[2] In response to this complaint, the Authority then incorporated Eastside as a separate, non-profit entity under the Alabama non-profit statute. *See* Ala.Code § 10-3-1 (1977).[3]

As a non-profit corporation, Eastside is structured similarly to most private, non-profit insitutions. Eastside has its own articles of incorporation and set of by-laws. These govern the general structure and management of the center, including appointment of its administrative board of directors. This board is responsible for seeing that adequate funds, staff and equipment are provided for the Center. The board also sets all major policies of the Center. Finally the board selects, hires, and fires the administrative staff of the Center.

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[2] Although the record is not clear on this point, it appears that the Jefferson Authority had some control over the dispersal of state funds to the three mental health centers in its region.

[3] The court below determined that Eastside could not be established as a public corporation under section 22-51-2 because the community mental health centers statute allows only one public facility per county, and another center had already filed for incorporation "in the three-county area of Jefferson, Blount and St. Clair." *See* Mem. Op. filed March 24, 1981. Admittedly it is not clear how the statutory maximum had been reached if only one center had applied in a three-county area. Apparently each of the three entities, the Authority, and Western and University Mental Health Centers, had filled the statutory quota for each of the three counties.

Under the by-laws there are 14 separate agencies responsible for appointing the 18 members of Eastside's board of directors. Four directors are appointed by the Jefferson Authority; the other fourteen directors are appointed by a mix of state or public agencies and private, non-profit organizations.[4] The parties in the present controversy stipulated in the district court that 10 of the appointing organizations should be considered as state or public entities and six as private, non-profit groups. The status of the remaining two was to be determined by the district court. The by-laws also provide that the Jefferson Authority must ratify the appointment of all board members, including those appointed by private organizations. There is no indication in the by-laws that any of the appointing agencies or the Jefferson Authority has the power to remove a board member once appointed.

So far as disclosed by the record, all board members are to be motivated solely by what they believe is best for the Center and its clientele. They are not expected to represent or vote for policies favoring their appointing agency. Thus as long as state regulations are not violated, the administration of the institution is not subject to the legal dictates of any "official" state agency or officer.

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[4] The Health Departments of Jefferson, Blount, and St. Clair counties appoint one member of the board in rotation; similarly, the three counties' Departments of Pensions and Security, and the three counties' Associations for Retarded Citizens, each appoints one member in rotation. In addition the three County Commissioners each appoints a member, the three appointees serving concurrently. Finally, the following agencies and organizations each appoints one board member: the Birmingham City Council, the Council for Exceptional Children, the Baptist Medical Center, the Hill Crest Foundation, Inc., the East End Memorial Hospital Association, the Mental Health Association of Jefferson County, the Occupational Rehabilitation Center, and the Birmingham Regional Health Systems Agency.

Eastside's relationship to the Jefferson Authority and to the State of Alabama in general is controlled partially by provisions in the by-laws and articles of incorporation, partially by state licensing standards, and partially by the contracts it maintains with various state agencies for the provision of mental health services to its catchment area. In addition, federal regulations prescribe certain of the Center's activities, as Eastside receives about 38 percent of its funds from the federal government.

All mental health centers in Alabama, including Eastside, are subject to considerable state monitoring. Eastside must comply with the state's Standards for Community Mental Health Centers or be subject to revocation of its certification. Changes in the Center's articles of incorporation or by-laws must be approved by the Jefferson Authority. The Authority must also approve the Center's budget. Eastside is subject to auditing by both state and federal officials, and state examiners conduct frequent site visits to inspect its operations. Eastside also participates in Alabama's State Retirement System, and is exempt from state sales taxes. Finally, upon dissoluton of the corporation, the articles of incorporation provide that all of Eastside's assets are to vest in the Jefferson Authority.

Eastside's general purpose is to provide comprehensive mental health and mental retardation services to a prescribed geographic area. The Center provides both inpatient and outpatient care, emergency care, consultation and educational services, as well as specialized services for children, elderly persons, and persons with alcohol or drug-related problems. In addition the Center runs the Transitional Home Program for people going to or about to return from a state hospital. The Center assists the local probate court in screening persons for state institutions. Finally, the Center provides some services for adult mentally retarded individuals. Some of these programs involve psychotherapeutic counseling, as well as prescribed medicine treatments. Eastside provides each of the services through contracts with schools, hospitals, nursing homes, or some other state facility or agency.

At present there are 25 community mental health centers in the State of Alabama. Twenty of these Centers are public corporations under Ala.Code § 22-51-2; two are operated directly by local governmental bodies. The remaining three are section 10-3-1 nonprofit corporations such as Eastside Mental Health Center.

III.

The defendant-appellee Eastside Mental Health Center claims exemption from the minimum wage provisions of the FLSA under the principles set out in the case of *National League of Cities* v. *Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). Appellee asserts that the *Usery* case requires FLSA exemption for all state or public agencies performing traditional government functions. The appellee argues that because Eastside is so thoroughly allied with the State of Alabama, and furthermore because it is engaged in an ordinarily governmental function, namely, the provision of mental health services to the public, the *Usery* test has been satisfied and exemption is appropriate. We disagree with appellee's understanding of *Usery* and its corollary principles, and for the reasons that follow we hold that Eastside should not be exempt from the FLSA.

The overriding constitutional concern faced by the court in *Usery*, and thus by this Court in the present case, is the problem of affixing a clear and workable boundary between the two sovereignties in our federal system. The problem is amplified as always by the necessity that the result adhere to the facts before us while at the same time serve as a clear guide for future applications. And most importantly we are faced with the task of reaching a determination that is consonant with constitutional precedents.

The existing precedents make clear that the notion of state sovereignty is as important to a truly federal system of government as it is hard to define, let alone pigeonhole into any one constitutional provision. At least since the case of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 410, 4 L.Ed. 579 (1819), the Court has recognized that state and federal powers must be preserved in a delicate equipoise in a federal system such as we have. The need for this balancing of state and federal power "rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other." *Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, 523, 46 S.Ct. 172, 174, 70 L.Ed. 384 (1926) (citing *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat) 316, 4 L.Ed. 579 (1819)). There exist certain constitutional provisions that emphatically, though perhaps ambiguously, address the necessity of protecting the sovereignty and power of the individual state governments. *See Hans* v. *Louisiana*, 134 U.S. 1, 21, 10 S.Ct. 504, 509, 33 L.Ed. 842 (1890) (Eleventh Amendment protects states against unconsented suits even if they arise under the Federal Constitution or laws of the United States); *Hodel* v. *Virginia Surface Min. & Rec. Ass'n*, ___ U.S. ___, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981) (Tenth Amendment contains limits on federal power to regulate states as states).[5]

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[5] The ambiguity of Tenth Amendment case law is merely coextensive with the ambiguity of its language. *Compare United States* v. *Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941) (Tenth Amendment states but a truism), *with Fry* v. *United States*, 421 U.S. 542, 547 n.7, 95 S.Ct. 1792, 1795 n.7, 44 L.Ed.2d 363 (1975) (Tenth Amendment declares policy that Congress may not exercise power so as to impair the states' integrity or their ability to function effectively in a federal system), *National League of Cities* v. *Usery*, 426 U.S. 833, 842, 96 S.Ct. 2465, 2470, 49 L.Ed.2d 245 (1976)(relying on Tenth Amendment case precedents to strike down FLSA as applied to state and municipal governments), *and Hodel* v. *Virginia Surface Min. & Rec. Ass'n*, ___ U.S. ___, ___, 101 S.Ct. 2352, 2366, 69 L.Ed.2d 1 (1981) (citing Tenth Amendment as embodying certain limits on federal Commerce Clause regulations).

Even Eleventh Amendment jurisprudence suffers from substantial confusion and complexity. For example, the principle of state immunity from unconsented suits has been qualified or at least restricted by a countervailing principle distinguishing suits against a state from suits against an individual officer of the state. The latter

Resort to specific constitutional provisions, or even individual case precedents, is nevertheless inadequate to a determination of the proper balance to be struck between the state and federal sovereignties. "Experience has shown that there is no formula by which the line may be plotted with precision in advance." *Metcalf & Eddy* v. *Mitchell*, 269 U.S. at 523, 46 S.Ct. at 174 (1926). Indeed such an approach is apparently inappropriate. In the most recent judicial attempt to determine the appropriate state-federal relationship, the Court in *Usery* case relied upon a wealth of case precedents involving issues ranging from intergovernmental tax immunity, to federal regulation of commerce, to state control over the location of its state capitol. *See Metcalf & Eddy* v. *Mitchell*, 269 U.S. 514, 46 S.Ct. 172, 70 L.Ed. 384 (1926); *United States* v. *California*, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567 (1936); *United States* v. *Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941); *Coyle* v. *Oklahoma*, 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853 (1911). In line with the *Usery* precedent, we thus feel it appropriate, indeed constitutionally incumbent upon us, to look to a range of case sources interpreting a variety of constitutional provisions and penumbras in determining how to strike the proper balance in the present case.

In determining whether a state's sovereignty has been unduly and unconstitutionally impaired by federal regulation, the courts have in the past considered several factors. First, they have looked to the nature of the entity being regulated. In *Usery* the Court acknowledged that attributes of state sovereignty emanating from the federal structure of our government put the states on a different footing from purely

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type of suits, at least in some circumstances, is not barred by the Eleventh Amendment. *Compare Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) (establishing equitable cause of action against state officers in their individual capacities notwithstanding Eleventh Amendment) *with Edelman* v. *Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (qualifying Ex Parte Young in situations where remedy requires payment of state funds as compensation for past damages).

private entities with respect to federal regulation of their activities. Citing *Coyle* v. *Oklahoma*, 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853 (1911), the Court in *Usery* declared that even some affirmative grants of constitutional power to the federal government must be limited when national regulations directly affect a state or its political subdivisions in carrying out normal governmental activities. *National League of Cities* v. *Usery*, 426 U.S. at 845, 855-56 n.20, 96 S.Ct. at 2471, 2475-76 n.20 (1976).

Of course the determination that a regulation affects a state or its political subdivision is not always a simple one to make. There exist many public or quasi-public agencies the status of which, for purposes of determining a state sovereignty question, is not easy to characterize. Frequently the courts have faced similar classification problems when deciding cases in the areas of state action doctrine, *see, e.g., Evans* v. *Abney*, 396 U.S. 435, 90 S.Ct. 628, 24 L.Ed.2d 634 (1970), § 1983 litigation, *see, e.g., Adickes* v. *Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), and Eleventh Amendment sovereign immunity questions, *see, e.g., Edelman* v. *Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).[6]

At issue in *Usery* was the constitutionality of the Fair Labor Standards Act when applied to wages paid by state and subordinate political subdivisions to their employees. The Court held that this would seriously impair the right of the state to carry out its normal functions. It was only the payment of wages by *state or subordinate political bodies* that was involved there.[7] The Court in *Hodel* v. *Virginia Surface Min. & Rec. Assn., supra,* interpreted *Usery* as requiring that, *inter alia,* the federal regulation in question must address the "States as States" in order for there to be an infringement of state sovereignty. *Hodel* v. *Virginia Surface Min. & Rec. Assn.*, 101 S.Ct. at 2366 (1981).

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[6] The Court in neither the *Usery* not the *Hodel* case had to face this issue, as the nature of the regulated entities was not disputed in either case. In *Usery* many states were party to the suit, and the issue was whether the FLSA as applied directly to the states was within Congress' powers. *National League of Cities* v. *Usery*, 426 U.S. at 854, 96 S.Ct. at 2475 (1976). Similarly in *Hodel* the states were parties, and the Court did not question their status as states, but rather doubted that the states were being directly regulated by the federal government. *Hodel* v. *Virginia Surface Min. & Rec. Assn.*, 101 S.Ct. at 236 (1981).

Beyond that we think the relevant inquiry is the extent of control the states maintain over the activities and administration of the entity in question. Indeed it seems to us appropriate to borrow from principles established by the court in NLRB cases involving the issue of whether a particular entity is a political subdivision and is therefore exempt from the provisions of the National Labor Relations Act, 29 U.S.C.A. § 152(2) (1973). *See NLRB* v. *Natural Gas Utility Dist.*, 402 U.S. 600, 91 S.Ct. 1746, 29 L.Ed.2d 206 (1971).[8] In *NLRB* v. *Natural Gas,* the Court in a close case considered relevant whether the entity seeking exemption was administered by individuals responsible to public officials or to the general electorate. *Id.* at 605, 91 S.Ct. at 1749-50. Although these cases turn on the construction of the Labor Relations Act and not on constitutional considerations of state sovereignty, we find them helpful in our inquiry, and until the Court holds otherwise we will adopt this approach.

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[7] That subordinate bodies are included in the *Usery* exemption is a principle which derives from explicit language in the opinion, as well as by implication, at least insofar as the term relates to "such areas as fire protection, police protection, sanitation, public health, and parks and recreation." *National League of Cities, supra,* 426 U.S. at 851, 96 S.Ct. at 2474. The opinion specifically included "political subdivisions" as entities for which classification of sovereignties is appropriate. *Id.* at 855, n.20, 96 S.Ct. at 2476, n.20. Additionally, the Court mentioned state schools, hospitals, and other "subordinate arms of state government" as properly labelled sovereigns. *Id.*

[8] We base our analogy to the labor cases on the simple fact that the precise term "political subdivision" is used in both the *Usery* case and the NLRB cases.

Second, in deciding cases involving possible federal infringement of state sovereignty, the courts have assessed the function of the entity being regulated. In *Usery* the Court repeatedly emphasized that the FLSA directly affected a function that was traditionally a governmental activity, namely, the structuring of wage and hour policies. *National League of Cities* v. *Usery*, 426 U.S. at 845-46, 851-52, 96 S.Ct. at 2471-72, 2474 (1976). The Court alternately characterized this function as traditional, essential, fundamental, and integral. *Id.* at 845, 851, 96 S.Ct. at 2471, 2474. The Court listed several other functions that could be so characterized, including fire prevention, police protection, sanitation, public health, and parks and recreation. *Id.* at 851, 96 S.Ct. at 2474. Moreover, in overruling *Maryland* v. *Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), the Court implicitly included the operation of public schools and hospitals as traditional functions of the states. 426 U.S. at 855, 96 S.Ct. at 2476. In *Hodel*, the Court listed the traditional nature of the function involved as the second condition precedent to a finding that a state's sovereignty has been constitutionally infringed by federal regulation. *Hodel* v. *Virginia Surface Min. & Rec. Ass'n*, 101 S.Ct. at 2366 (1981).

The third and final indicium of state sovereignty frequently considered by the courts is the nature of the federal regulation involved. The Court in *Usery* discussed at length the effects on state government operations that would result from application of the FLSA. The Court focused on the significant costs, both in terms of money and in terms of necessary restructuring of employment operations, that states would have to bear if forced to comply with the FLSA. *National League of Cities* v. *Usery*, 426 U.S. at 846-51, 96 S.Ct. at 2471-74 (1976). Similarly in *Fry* v. *United States*, the Court cited the unintrusive nature of the Economic Stabilization Act as a primary reason for upholding its application to state employees. *Fry* v. *United States*, 421 U.S. at 548, 95 S.Ct. at 1796 (1975). Finally, in the intergovernment tax immunity cases, the Court has been guided by an assessment of the interference with state government functioning. *See Helvering* v. *Gerhardt*, 304 U.S. 405 at 419-20, 58 S.Ct. 969 at 974-75, 82 L.Ed. 1427 (1938).

IV.

Before applying the foregoing principles to the facts of the case before us, we may well benefit from a quick study of Immanuel Kant's On the Old Saw: That May be Right in Theory but it Won't Work in Practice (E. B. Ashton trans. 1974). Precise legal guidelines easily applicable to particular fact situations do not exist in cases such as this involving broad constitutional concepts such as that of sovereignty. As will become clear shortly, our job is compounded in this case by the borderline nature of the facts before us. Nevertheless we are convinced that upon a consideration of all the factors, on balance it seems clear that Eastside is not and should not be treated as a sovereign entity in our federal system.

The determinative fact in this case is simply that the entity with which we are dealing is not a state or a political subdivision of a state as defined by the Court in *Usery* and in other cases involving similar issues. Eastside Mental Health Center is not the State of Alabama, nor is it an agency or department of the State of Alabama. Indeed no party contends otherwise.

Moreover as it currently exists under Alabama state law, Eastside is not a public agency or corporation. As was noted earlier, the Center is incorporated as a non-profit institution under section 10-3-1, rather than as a public corporation under section 22-51-2 of the Alabama Code. The Center is in fact distinct from many of the other community mental health centers operating in the State of Alabama in precisely this regard. For whatever reason, Alabama did not elect to operate Eastside as a state institution with state employees; instead it set up a not for profit corporation with a separate, independent board of directors to administer it. Whatever may have been the state's reason for doing it this way, it must live with the consequences. It cannot claim an immunity based on a condition which itself sought to avoid.

Here, then, lies the greatest difference between *Usery* and the facts of this case. Here we are concerned with application of the FLSA wages paid by a not for profit corporation which operates by contact with a public corporation of the State of Alabama and by contract with other entities. There is thus no impact on the state in its relation with its own employees. Thus, the FLSA does not affect the "States as States."

For such reasons as were satisfactory to it, the State of Alabama elected not to employ any persons to operate institutions performing such services as are performed by Eastside. By making this election it removed the agency from the protection of the Tenth Amendment as delineated in *Usery* and *Hodel*. Instead, certain individuals organized a corporation under the general legislative authorization used by other citizens to organize all educational, religious and other eleemosynary institutions, which thereafter contracted with Jefferson, itself an independent corporation, to carry out these functions.

For purposes of the sovereignty issue before us, Eastside is thus best characterized as a private, non-profit corporation, licensed in the State of Alabama to perform the services of a community mental health center, and carrying out such services by means of ordinary contracts with various state and local agencies and institutions. It is thus analogous to a normal nonprofit institution in its basic corporate structure, while at the same time analogous to a private business doing contracting work for the state in its basic business operations.

Although the Center is subject to substantial state regulation, this fact does not change our characterization. With respect to the state licensing regulations, we find it difficult to distinguish Eastside from a variety of private corporations and professional individuals that are subject to similar state control pursuant to licensing statutes. Such controls are normal means by which states effectuate public policies through the regulation of private entities. These licensing controls do not, however, somehow magically transform the fundamental nature of the licensed entity into a public agency or official.

The additional control exerted by the Jefferson Authority over Eastside's budget, board of directors, and residual assets upon dissolution, are not so significant as to justify characterizing the Center as an arm of the state. With respect to the board of directors, not only does the State of Alabama not have control over the appointment of nearly one-half of the board membership, in addition it has no power whatsoever to dismiss any of the board appointments. Members of the board do not serve as representatives of the state or any of its agencies. For this latter reason it is clear that no member of the administrative board is directly responsible to a public official or to the general electorate. Under the test set out in *NLRB* v. *Natural Gas Utility Dist.*, 402 U.S. 600, 91 S.Ct. 1746, 29 L.Ed.2d 206 (1971), this factor indicates that Eastside is not a political subdivision of the State of Alabama. The other controls, while perhaps uncommon in the context of normal private corporations contracting with the states, must be viewed simply as stringent licensing standards necessary to the effective implementation of the state's police power in the mental health arena.

If the State of Alabama chooses to foster the provision of mental health services by allowing Eastside and similar mental health centers certain fringe benefits, including sales tax exemption and participation in the State Retirement System, this does not mean that Eastside should be viewed as an arm of the state. Alabama either provides or legally may provide similar benefits to entities that are declaredly not public agencies.[9]

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[9] The State of Alabama does in fact grant sales tax exemption to many other private businesses. *See* Ala.Code § 40-23-4 (1975). In addition, membership in the State Retirement System is not limited to state agencies, as it is also available to employees of a "public or quasi-public organization." *See* Ala.Code § 36-27-6 (1975). Assuming Eastside is considered a quasi-public organization, it may participate in the retirement system and yet still not be a state or public agency within the meaning of the term as used in the *Usery* case.

Our conclusion that the Eastside Mental Health Center is not a state agency or a political subdivision of the state is sufficient under the *Hodel* test for us to hold that it may not be exempt from the FLSA. Just as in *Hodel*, we need not reach the other factors in the sovereignty test if we initially find, as we do here, that the entity with which we are dealing is not a state. *See Hodel* v. *Virginia Surface Min. & Rec. Ass'n*, 101 S.Ct. at 2369 (1981). For this reason it is not necessary for us to consider the extent of the FLSA's effect on Eastside's function of granting mental health services, nor need we decide whether such function is traditional or essential. In view of the significance of the term "integral" used in the *Usery* opinion, however, we think it important to briefly discuss the application of this concept to the facts of this case. In short we believe that even if the State of Alabama had chosen to operate Eastside as a state agency, the Center is not performing an "integral" function and thus the *Usery* exemption would not apply.

In *Usery* the Court used the term "integral" to define the nature of a state operation that is protected by considerations of sovereignty. "We hold that insofar as the challenged amendments [of the FLSA] operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. 1, § 8,cl.3." 426 U.S. at 852, 96 S.Ct. at 2474 (1976) (footnotes omitted).[10]

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[10] We believe that the term "integral" relates to the nature of the state function to be given sovereign protection. Admittedly the Court in *Usery* appears in the quoted passage to differentiate an "operation" from a "function." It may be said that the phrase "integral operation" refers to the manner in which the state chooses to carry out its traditional function, including the state's structuring of its wage policies for those employees carrying out such functions. Here the term "integral" would refer both to the fact that the setting of wage policies is *crucial* to the state's ability to carry out effectively a particular function, and to the fact that such policies affect the *whole* of the state's operations, in this case, all employees of the state.

Dictionary definitions indicate that the adjective "integral" signifies something that is a part of or is in itself a whole. See *Webster's New International Dictionary* 1290 (1936). We think an integral function is in this context one that a state performs for or in relation to the society at large, the state as a whole. One such function is the state's taxing power; another is the state's function of enacting laws for the public good through its legislative body. For purposes of determining whether a particular function is "integral" in the context of sovereignty decisions such as the one before us, we think it therefore helpful to look at whether the federal regulation in question affects a state function in a way that reverberates throughout the society as a whole.[11]

For example, any interference with a state's provision of police protection to its citizenry, or its ability in general to pass laws in its legislature, clearly affects all people in the state. Such integral functions may be contrasted with those that, while perhaps traditional, are nevertheless not functions which relate to the entire state populace. An example of a non-integral function is a state's enactment of particular regulations

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Under this view, it is of course true that any case such as the one before us involving the application of the FLSA to what is arguably a state entity involves an interference with the state's ability to structure its *integral* operations. In our opinion, however, the term "integral" also applies to the type of governmental function that is to be protected under a concept of state sovereignty.

At least one commentator agrees that the term "integral" is used in *Usery* to modify the type of state function involved. *See* Note, Taking Federalism Seriously: Limiting State Acceptance of National Grants, 90 Yale L.J. 1694, 1708 (1981). *See also, National League of Cities* v. *Usery*, 426 U.S. at 851, 855, 96 S.Ct. at 2476 (using phrase "integral governmental functions").

[11] It bears noting that in this respect a determination of whether a function is integral requires an assessment of the effect of the federal regulation, which is in fact the third factor which the courts have considered in making sovereignty determinations. *See* pp. 678-679 *supra*.

addressing specific problems such as water usage, farming, railroads, utilities, etc. Even though such functions may have been traditionally carried out by the state, federal regulation thereof is not prohibited because the functions do not produce significant consequences affecting all persons in the state and thus are not, in our definition of the term, "integral" functions.[12]

With these principles in view, we find that Eastside's function of providing mental health services to the citizens of Alabama is not an integral function as we have interpreted the term. The function involved here addresses a specific problem affecting a limited class of persons within the state. Any effect the FLSA will have if applied to Eastside is not one that is so extensive that it will be felt by the entire citizenry of Alabama.

REVERSED.

JAMES C. HILL, Circuit Judge, specially concurring:

I concur in the judgement reversing this case.

The majority opinion observes:

> "For whatever reason, Alabama did not elect to operate Eastside as a state institution wih state employees; instead it set up a not for profit corporation with a separate, independent board of directors to administer it. Whatever may have been the state's reason for doing it this way, it must live with the consequences. It cannot claim an immunity based on a condition which it itself sought to avoid."

Additional language expands upon and explains this reason for our judgment, and I join in the opinion to that extent.

Insofar as the opinion reaches conclusions based upon the hypothetical ("In short we believe that even if the State of

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[12] Under our test regarding integral functions, the Court in *Hodel* could have easily found that the function of regulating the mining industry, while perhaps traditional, as the state parties argued, was nevertheless nonintegral because the federal interference did not affect the entire state citizenry.

Alabama had chosen to operate Eastside as a state agency, . . ."), I am not willing to join. Were it necessary to express a conclusion, I am presently inclined to the view that such an operation would be exempt.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION NO. 79-G-0524-S

DAVID R. WILLIAMS,
Plaintiff,

v.

EASTSIDE MENTAL HEALTH CENTER, INC., a corporation,
Defendant.

FILED
March 24, 1981

ENTERED
March 24, 1981

ORDER

Pursuant to this court's order filed June 26, 1980, in the above-styled cause that the case be reopened in order to address the issue raised by the plaintiff in his motion for reconsideration filed on April 21, 1980, the court has considered the pleadings and submissions of counsel and is of the opinion that the plaintiff's motion for reconsideration is due to be denied.

Accordingly, it is ORDERED, ADJUDGED and DECREED that plaintiff's motion for reconsideration be and it hereby is DENIED, in conformity with the Memorandum Opinion being entered contemporaneously herewith.

DONE and ORDERED this 24th day of March 1981.

/s/ J. Foy Guin, Jr.
United States District Judge
J. FOY GUIN, JR.

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MEMORANDUM OPINION

This is an action arising under the minimum wage and hour provisions of the Fair Labor Standards Act (FLSA) as amended, 29 U.S.C. § 201 *et seq.* It came to be heard originally by this court upon cross-motions for summary judgment by both plaintiff and defendant. Summary judgment was entered for defendant on April 10, 1980, based on a finding that defendant was constitutionally immune from application of the Fair Labor Standards Act due to the tenth amendment, as addressed in *National League of Cities* v. *Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976). Plaintiff petitioned for reconsideration on the grounds that defendant was not shown to be a state government agency. He was joined by the Secretary of Labor as *amicus curiae*. This court entered an order on June 26, 1980, that the case be reopened for good cause shown in order to address the issue raised by plaintiff in his motion to reconsider.

Plaintiff was employed by defendant, Eastside Mental Health Center, from February 1977 to May 1979. During this period his work required him to be on the premises for a continuous 96-hour period followed by 96 hours of off-duty time. Plaintiff alleges that defendant did not pay him compensation as prescribed by provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 206, 207. He claims the additional compensation allegedly due him under the FLSA. Defendant claims exemption from the Act due to the holding in *National League of Cities*.

The principle issue in this action is whether employees of defendant Eastside Mental Health Center are covered under the minimum wage and maximum hour provision of the Fair Labor Standards Act. Specifically, the questions to be resolved are: (1) what test is to be used to determine if an entity's operation is an "integral governmental function" within the scope of *National League of Cities* v. *Usery*, and (2) does defendant corporation qualify under that test and thereby become exempt from compliance with the Act through tenth amendment protection?

In *National League of Cities*, the Supreme Court held the 1974 amendment to the Act involving wage and hour provisions was unconstitutional as applied in general to state and local government employees because those sections of the Act "impermissibly interfere with the integral governmental functions of these bodies." 426 U.S. at 851, 96 S. Ct. at 2474, 49 L. Ed. 2d at 257. The Court found that federal wage and hour determinations which respect to "functions . . . which state and local governments are created to provide, [involving] services . . . which the States have traditionally afforded their citizens," were matters essential to the separate and independent existence of those governments and, therefore, beyond the reach of congressional power under the commerce clause. *National League of Cities*, *supra*, at 851. The Court expressly overruled *Maryland* v. *Wirtz*, 392 U.S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d 1020 (1968), which had upheld the extension of the Act to employees of state schools, hospitals and like public institutions.

This immunity, however, was limited by the Court to those public services or activities which involve traditional or integral governmental functions. *National League of Cities* v. *Usery*, 426 U.S. at 852, 96 S. Ct. at 1474, 49 L. Ed. 2d at 257 (1976); *Public Services Co. of North Carolina* v. *Federal Energy Regulatory Commission*, 587 F.2d 716, 721 (5th Cir. 1979). The Court described the immune activities as those "performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851, 96 S. Ct. at 2474, 49 L. Ed. 2d at 257.

The scope of this limitation is the central issue in this case. By overruling *Wirtz*, the Court implicitly included the operation of public schools, hospitals and like public health care institutions within the category of traditional integral governmental functions. However, *National League of Cities* does not articulate a specific test to be applied in determining whether a particular governmental function should be deemed to be within this protected area of state sovereignty.

Plaintiff argues that the test to be used is the two-step test that the National Labor Relations Board (NLRB) uses to determine if it has jurisdiction over a labor dispute. The Fifth Circuit adopted this test in *NLRB* v. *Highview, Inc.*, 590 F.2d 174 (5th Cir. 1979), in order to determine if a nursing home qualified as a political subdivision which would be exempt from the National Labor Relations Act (NLRA). According to the Fifth Circuit's decision in *Highview*, an employer is "a political subdivision if either (1) the entity was created directly by the state, so as to constitute a department or administrative arm of the government, or (2) if the entity is administered by individuals who are responsible to public officials or to the general electorate." *Highview*, at 176.

Plaintiff contends that defendant must first meet the NLRB's test in *Highview* as a prerequisite to a determination of whether or not its operation involves a traditional or integral governmental function. Plaintiff argues that defendant is covered by the Fair Labor Standards Act as it is an "enterprise engaged in commerce" as defined by 29 U.S.C. § 203(5) and does not constitute a political subdivision or agency of the state government even though it might be fulfilling an integral governmental function. It is plaintiff's belief that *National League of Cities* does not apply until the entity first qualifies as a political subdivision or state agency under the test articulated in *Highview*.

Defendant claims that it is a public corporation performing an integral governmental function and is therefore exempt from the FLSA because of *National League of Cities*. It contends that the proper test is not *Highview*, but the one adopted by the Sixth Circuit in *Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979).

Amersbach states that certain elements are common to those services which the court has characterized as typical of those performed by governments. These elements are: (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense, (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain, (3) government is the principal provider of the service or activity, and (4) government is particularly suited to provide the service or perform the activity because of a community-wide need for the service or activity. *Amersbach*, 1037.

The defendant contends that even if the *Highview* test is employed, it qualifies as a political subdivision and should be held exempt from compliance with the FLSA. Finally, defendant argues that if it is not found to fall under a *National League of Cities* exemption, it is excused from liability by 29 U.S.C. § 259.

This court holds that Eastside is exempted from compliance with the FLSA, as it falls under *National League of Cities* protection, using the *Amersbach* test. Alternatively, it also is exempt from compliance using the *Highview* test, as defendant qualifies as a political subdivision under part two of that test in that its administrators are responsible to public officials.

The present case should be viewed in relation to the four elements noted above in *Amersbach*. Furthermore, the *High-*

view test involves the NLRA, not the FLSA. It is used merely to determine whether or not an employer is covered by the NLRA and therefore subject to the jurisdiction of the NLRB. The FLSA has no such board that oversees the implementation of the Act.

It should be emphasized that the main issue is whether the defendant provides a traditional governmental service, not merely whether or not it is a political subdivision or public corporation. The FLSA may not be applied "to directly displace the States' freedom to *structure integral operations* in areas of traditional governmental functions." *National League of Cities*, 426 U.S. at 852, 96 S. Ct. at 2475, 49 L. Ed. 2d at 257 (emphasis added). In this action, the defendant is one of twenty-five community mental health centers in Alabama. Together, these twenty-five centers form the entire mental health system established for and by the State of Alabama. Two are operated by purely governmental agencies, twenty are incorporated as public corporations under Code of Alabama 1975, Section 22-51-1, *et seq.*, and three, including the defendant, are incorporated as nonprofit corporations under Code of Alabama 1975, Section 10-3-1, *et seq.* Because the community mental health center statute allows only one facility per county to be incorporated under it and another agency had already filed for incorporation pursuant to that statute in the three-county area of Jefferson, Blount and St. Clair, the defendant was incorporated under the statute pertaining to nonprofit corporations.

Defendant acts jointly with this other agency, known as the Jefferson-Blount-St. Clair Mental Health/Mental Retardation Authority (hereinafter, "the Authority"), to carry out the purposes and functions of a Section 22-51-1 corporation. The Authority has full and absolute power of ratification and approval of defendant's operating budget, articles of incorporation and bylaws. Additionally, the defendant, Eastside, has been assigned a specific geographical area, by the State, in which to provide services through the Alabama Community Mental Health Facilities Plan.

For these reasons it is apparent that defendant is part of the "structure" that the State of Alabama set up to provide mental health care services. These services are clearly of those types for which the government is "particularly suited" and for which there is community-wide need, within the factors set out in *Amersbach*. These services are traditional governmental services for which the provider is shielded from compliance with the FLSA by *National League of Cities*.

Alternatively, if defendant must first satisfy the *Highview* test as a political subdivision before an assessment can be made of whether or not if is performing an integral governmental function, it also meets this additional requirement. In *Highview*, a nursing home was held not to be a political subdivision primarily because its directors were "self perpetuating" and "not directly responsible to the public officials of the county." *Highview*, at 177.

In this case, Eastside's board of directors is not elected but externally appointed by agencies ranging from public or governmental to private organizations, the majority of which come from the public or governmental sector. Furthermore, defendant must submit copies of minutes of every board of directors' meeting to the State Department of Mental Health and to the Authority. Additionally, Eastside is subject to: audit and review by the State Examiners of Public Accounts for the State of Alabama, periodic visitation and review by the Department of Mental Health for the State of Alabama, mandatory compliance with the Standards for Community Mental Health Centers established by the Department of Mental Health for the State of Alabama, and compliance with the State of Alabama's competitive bid laws when purchasing goods. Defendant is exempt from payment of state sales tax, is a member of, and its employees covered by, the State of Alabama retirement and pension system, and is prohibited from owning any real property.

The extent of state control and accountability of defendant's administrators to state agencies and public officials renders it a political subdivision under part two of the *Highview* test. Eastside is subject to more controls of the state than the private operator of a county hospital was in *Board of Trustees of Memorial Hospital* v. *NLRB*, 624 F.2d 177 (10th Cir. 1980), in which the hospital was found to be a political subdivision. In addressing the political subdivision issue in *National League of Cities*, the Supreme Court stated:

> As the denomination "political subdivision" implies, the local governmental units which Congress sought to bring within the Act derive their authority and power from their respective States. Interference with integral governmental services provided by such subordinate arms of a state government is therefore beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the state itself.

National League of Cities, 426 U.S. at 855, n. 20, 96 S. Ct. at 2476, n. 20, 49 L. Ed. 2d at 260, n. 20 (emphasis added).

In this action Eastside is performing an integral governmental service as a subordinate arm of the state. It is one of the twenty-five health centers which make up the total mental health care system of the State of Alabama.

For the reasons stated herein, final judgment is due to be granted to defendant in this action.

A separate order in conformity herewith is being entered.

DONE this the 24th day of March 1981.

/s/ J. Foy Guin, Jr.
United States District Judge
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 79-G-0524-S

DAVID R. WILLIAMS,
Plaintiff,
v.
EASTSIDE MENTAL HEALTH CENTER, INC., a corporation,
Defendant.

FILED
April 9, 1980

ENTERED
April 10, 1980

FINAL ORDER GRANTING SUMMARY JUDGMENT

This cause came before the court on cross-motions by plaintiff and defendant, each seeking summary judgment in his own behalf, thereby admitting the facts on the issue of liability, as before the court, without dispute. Having considered the pleadings, submissions of counsel, and applicable law, the court is of the opinion that judgment is due the defendant as a matter of law, that there is no just reason for delay in issuing a final judgement, and that, therefore, defendant's motion should be granted, and plaintiff's denied, in conformity with the Memorandum Opinion entered contemporaneously herewith. Accordingly, it is

ORDERED, ADJUDGED and DECREED that plaintiff's motion for summary judgment be and the same hereby is DENIED; and it is

FURTHER ORDERED that defendant's motion for summary judgment be and the same hereby is GRANTED; and it is

FURTHER ORDERED that final judgment be and the same hereby is GRANTED in favor of the defendant and against the plaintiff, and that the plaintiff shall have and recover nothing of the defendant in this case.

DONE and ORDERED this 9th day of April 1980.

/s/ J. Foy Guin, Jr.
United States District Judge
J. FOY GUIN, JR.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 79-G-0524-S

DAVID R. WILLIAMS,
Plaintiff,
v.
EASTSIDE MENTAL HEALTH CENTER, INC., a corporation,
Defendant.

FILED
April 9, 1980

ENTERED
April 10, 1980

MEMORANDUM OPINION

This is an action arising under the minimum wage and maximum hour provisions of the Fair Labor Standards Act, as amended, 29 U.S.C. § 201 *et seq*. It is now being heard on the cross-motions of both plaintiff and defendant for summary judgment.

The central issue involved in the motions for summary judgement is whether employees of the Eastside Mental Health Center are covered under the minimum wage and maximum hour provisions of the Fair Labor Standards Act. Resolution of this issue turns on whether the operation of the Eastside Mental Health Center is an "integral government function" within the scope of *National League of Cities* v. *Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976).

The Fair Labor Standards Act was amended in 1974, Pub. L. No. 93-259, 88 Stat. 55, to extend its wage and hour provisions to virtually all state and local government employees. 29 U.S.C. § 203(d),(s)(5), (x). The plaintiff in the present case was a home manager at Eastside Mental Health Center, a corporation incorporated under the Alabama Non-Profit Corporation Act.

The plaintiff has alleged that the Eastside Mental Health Center is an "enterprise engaged in commerce" as defined by 29 U.S.C. § 203(s), as the defendant has admitted that two or more of its employees have handled goods which moved in interstate commerce and the defendant has testified that the "Transitional Home" cared for the mentally ill who were residents there (McManus deposition at 15; Stockdale deposition 17-9). The plaintiff alleges that during his employment the defendant required the plaintiff to be on duty during a continuous 96-hour period, followed by 96 hours of free time, which resulted in a number of months in which the plaintiff worked in excess of 40-hour weeks at rates of pay less than that prescribed under the Act, 29 U.S.C. § 206(a).

The defendant argues that (1) the defendant is a public corporation and, therefore, under *National League of Cities* v. *Usery*, *supra*, is exempt from compliance with, or application of, the Fair Labor Standards Act, and (2) the defendant, Eastside Mental Health Center, Inc., is exempt from liability by § 259 of said Act.

In *National League of Cities*, the Supreme Court held the 1974 wage and hour provisions of the Act unconstitutional as they applied to state and local government employees generally because those sections of the Act "impermissibly interfere with the integral governmental functions of these bodies." 426 U.S. at 851, 96 S. Ct. at 2474, 49 L. Ed. 2d at 257. The Court found that federal wage and hour determinations with respect to "functions . . . which state and local governments are created to provide, [involving] services . . . which the states have traditionally afforded their citizens," were matters essential to the separate and independent existence of those governments and, therefore, beyond the reach of congressional power under the commerce clause. *Id* at 851. The Court expressly overruled *Maryland* v. *Wirtz*, 392 U.S. 183, 88 S. Ct. 2017, 20 L. Ed. 2d

1020 (1968), which had upheld extension of the Act to employees of state schools, hospitals and like public institutions.

However, the Supreme Court limited the scope of this immunity to those public services or activities which involve traditional or integral governmental functions. *National League of Cities* v. *Usery*, 426 U.S. at 852, 96 S. Ct. at 1474, 49 L. Ed. 2d at 257 (1976); *Public Service Co. of North Carolina, Inc.* v. *Federal Energy Regulatory Commission*, 587 F.2d 716, 721 (5th Cir. 1979). The Court spoke of those activities "performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U.S. at 851, 96 S. Ct. at 2474, 49 L. Ed. 2d at 257. The meaning of this limitation is the central issue in this case. By overruling *Wirtz*, the Court implicitly included the operation of public schools, hospitals and like public health care institutions within the category of traditional integral government functions. However, *National League of Cities* does not articulate a specific test to be applied in determining whether a particular government function should be deemed to be within this protected area of state sovereignty.

The Sixth Circuit in *Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979), however, holds that certain elements are common to those services which the court has characterized as typical of those performed by governments. These elements are: (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a community-wide need for the service or activity. *Amersbach* at 1037.

The present case should be viewed in relation to the elements noted above. It should be emphasized that the issue is not merely whether the defendant is a public corporation, but whether it provides a traditional government function. The defendant corporation is incorporated as a non-profit corporation under Code of Alabama 1975, § 10-3-1, rather than the community mental health center statute, Code of Alabama 1975, § 22-51-1, because the statute allows only *one* facility *per county* to be incorporated under it and another agency had already filed for incorporation under that statute. The defendant acts jointly with this other agency, known as the Jefferson-Blount-St. Clair Mental Health/Mental Retardation Authority (hereinafter, "the Authority"), to carry out the purposes and functions of a § 22-51-1 corporation. The Authority has full and absolute power of ratification and approval of the defendant's operating budget, Articles of Incorporation and By-Laws. See Articles Four and Twelve of the By-Laws (Board Book). The directors of defendant are not elected, but are appointed by various public and governmental agencies and entities, pursuant to the requirements of § 22-51-1 *et seq.*, Code of Alabama 1975, the standards with which the defendant must comply in order to operate a center, and 42 U.S.C. § 2681 *et seq.* See Article Six of the By-Laws.

Additionally, the defendant has been assigned a specific geographical area, by the State, in which to provide services, Region M-5 as defined by the Alabama Community Mental Health Facilities Plan. The defendant is subject to audit by the Department of Examiners of Public Accounts and must submit to visitation, review, certification and evaluation by numerous state and federal agencies.

Thus, it appears that the defendant is performing an integral government function by providing services envisioned by Code of Alabama 1975, § 22-51-1, without pecuniary gain. Additionally, it is clear that the providing of mental health services is a service for which the government is "particularly suited" and for which there is a community-wide need, within the factors set out in *Amersbach* v. *City of Cleveland, supra.* Thus, this court holds that the Eastside Mental Health Center is a public corporation under the tests set out in *Amersbach* and is therefore exempt from compliance with the Fair Labor

Standards Act under *National League of Cities* v. *Usery*, *supra*.

For the reasons states herein, final judgment is due to be granted the defendant in this action.

A separate order in conformity herewith is being entered.

DONE this 9th day of April 1980.

/s/ J. Foy Guin, Jr.
United States District Judge
J. Foy Guin, Jr.

29 U.S.C. § 206 (Supp. IV 1980), reads in pertinent part as follows:

§ 206. Minimum wage

(a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

> (1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

* * *

(b) Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) of this section applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972, or the Fair Labor Standards Amendments of 1974 wages at the following rate: Effective after December 31, 1977, not less than the minumum wage rate in effect under subsection (a)(1) of this section.

29 U.S.C. § 207 (1976), reads in pertinent part as follows:

§ 207. Maximum hours

(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

> (A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,
>
> (B) for a workweek longer than forty-two hours during the second year from such date, or
>
> (C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

CODE OF ALABAMA 1975
TITLE 22
CHAPTER 51.
REGIONAL MENTAL HEALTH PROGRAMS AND FACILITIES.

Sec.

22-51-1. Definitions
22-51-2. Incorporation of public corporations—Authorized.
22-51-3. Same—Application—Contents.
22-51-4. Same—Same—Approval.
22-51-5. Same—Certificate of incorporation—Contents.
22-51-6. Same—Same—Execution and recording.
22-51-7. Same—Same—Amendments.
22-51-8. Board of directors—Composition; appointment, qualifications, terms and compensation of members; vacancies; executive committee.
22-51-9. Same—Meetings; quorum; constitution and bylaws.
22-51-10. Professional advisory committee.
22-51-11. Powers of corporation.
22-51-12. Control of facilities and programs.
22-51-13. Taxation exemption.
22-51-14. Appropriations by local governing bodies.

§ 22-51-1. Definitions

For the purposes of this chapter, unless otherwise indicated, the following terms shall have the meanings respectively ascribed to them by this section:

(1) ALABAMA MENTAL HEALTH BOARD. The public corporation of that name established by chapter 50 of this title as part of the state department of mental health.

(2) CONSTRUCTION and CONSTRUCT. Such terms include:

a. The construction of new buildings and the expansion, remodeling and alteration of existing buildings, including architects' fees; and

b. Equipping new buildings and existing buildings, whether or not expanded, remodeled or altered.

(3) COUNTY. Any county in the state.

(4) DEPARTMENT OF MENTAL HEALTH. The department of the state government having that name which was created and established by chapter 50 of this title.

(5) FACILITIES. Structures, equipment and furnishings, or any part or combination thereof, which are used, useful or capable of use and the use thereof in connection with the implementing and operation of programs as defined in this section.

(6) GOVERNING BODY. The county commission of a county or the council, commission or other like governing body of a municipality.

(7) INCORPORATORS. The natural persons forming a public corporation organized pursuant to the provisions of this chapter.

(8) PERSON. Such term includes, but is not limited to , a natural person, the United States of America, one of the several states, a public or private corporation, a municipality, a county or an agency, department or instrumentality of a county, of a municipality, of one or more of the several states or of the United States of America.

(9) PROGRAMS.

a. The planning and taking of other steps leading to comprehensive state and community action to combat all forms of mental or emotional illness or debility, including, but not limited to, alcoholism, drug addiction, epilepsy and mental retardation;

b. Studies of the needs and available resources of the state in relation to the above, the development of public awareness of the said disabilities and the need for combating them and the coordination of state and local activities relating to the various aspects of mental or emotional illness or debility, including, but not limited to, alcoholism, drug addiction, epilepsy and mental retardation and their prevention, treatment or amelioration;

c. The conducting of research relating to human development, whether biological, medical, social or behavioral, which may assist in finding the causes and means of prevention of mental or emotional illness or debility, including, but not limited to, alcoholism, drug addiction, epilepsy and mental retardation or in finding means of ameliorating the effects of same;

d. The providing of any one or more of the following services:

1. Inpatient;
2. Outpatient;
3. Partial hospitalization;
4. Emergency care;
5. Community education and consultation;
6. Diagnosis;
7. Evaluation;
8. Rehabilitation;
9. Precare;
10. Residential care;
11. Aftercare; and
12. The prevention of all forms of mental or emotional illness, including, but not limited to, alcoholism, drug addiction, epilepsy or mental retardation.

e. The clinical training of physicians and other technical and specialized personnel needed for research, diagnosis, treatment, education, training or care of the mentally or emotionally ill or debilitated, including, but not limited to, those persons suffering from alcoholism, drug addiction, epilepsy or mental retardation; and

f. Any combination of any of the foregoing. (Acts 1967, No. 310, p. 853, § 1.)

§ 22-51-2. Incorporation of public corporations—Authorized.

By proceeding in the manner set forth in this chapter, any number of natural persons, not less than three, may form a public corporation to contract with the state board of health or the Alabama mental health board in constructing and operating facilities and in carrying out programs in particular areas of the state. (Acts 1967, No. 310, p. 853, § 2.)

§ 22-51-3. Same—Application—Contents.

The said natural persons, referred to in section 22-51-2, shall file a written application with each governing body from which they desire authority to incorporate. Such applications shall:

(1) Describe in general terms the area of the state which will be served by the proposed facilities, which description will be sufficient if stated with reference to counties, municipalities, unincorporated communities or any part or combination thereof;

(2) State the location of the principal office of the proposed corporation;

(3) Submit such documents or evidence which the incorporators may consider appropriate, which shall include documents from the Alabama mental health board and the state board of health showing that the facilities and programs, which the incorporators propose to establish will be in accordance with minimum standards and criteria established by such boards;

(4) State which aspects of the programs, as defined in this chapter, the said incorporators propose to implement;

(5) State that each of the incorporators is a resident of the area which will be served by such proposed facilities and programs; and

(6) Request that each governing body, with which such application is filed, adopt a resolution approving the formation of the proposed corporation. (Acts 1967, No. 310, p. 853, § 3.)

§ 22-51-4. Same—Same—Approval.

Upon the adoption by each governing body to which an application was sent of a resolution approving the formation of the said corporation, the incorporators, or not less than three of them, shall proceed to complete the incorporation in the manner provided in this chapter. (Acts 1967, No. 310, p. 853, § 4.)

§ 22-51-5. Same—Certificate of incorporation—Contents.

The certificate of incorporation shall state:

(1) The names of the persons forming it, together with their addresses, and that each is a resident of the area which will be served by the proposed corporation;

(2) The name of the corporation;

(3) The location of the principal office of the corporation;

(4) The statement contained in the application which describes the area which will be served by the proposed corporation;

(5) The name of each governing body with which an application was filed in accordance with section 22-51-3;

(6) A statement of which aspects of the programs the corporation will implement; and

(7) Any other matters that the incorporators may choose to insert that are not inconsistent with this chapter or with other laws of the state. (Acts 1967, No. 310, p. 853, § 6.)

§ 22-51-6. Same—Same—Execution and recording.

A certificate of incorporation, in the form provided in section 22-51-5, shall be signed and acknowledged by the incorporators before an officer authorized by the laws of the state to take acknowledgments to deeds and shall have attached thereto a certified copy of each of the resolutions provided for in section 22-51-4 and a certificate by the secretary of state that the name proposed for the corporation is not identical to that of any other corporation organized under the laws of the state or so nearly similar thereto as to lead to confusion and uncertainty. The certificate of incorporation, together with the documents required by the preceding sentence to be attached thereto, shall be filed for record in the office of the judge of probate of the county specified in the certificate of incorporation as the county in which the principal office of the corporation shall be located. The said judge of probate shall forthwith receive and record the same. When the certificate of incorporation and attached documents have been so filed, the corporation referred to therein shall come into existence and shall constitute a public corporation vested with the rights and powers granted in this chapter under the name set forth in such certificate of incorporation. (Acts 1967, No. 310, p. 853, § 5.)

§ 22-51-7. Same—Same—Amendments.

The certificate of incorporation may be amended, from time to time, to provide for any objective that was not included in the original certificate of incorporation by proceeding as follows:

(1) The board of directors of the corporation, subject to the approval of the Alabama mental health board, shall first adopt a resolution setting forth and approving the proposed amendment.

(2) The proposed amendment shall then be submitted to each governing body which has appointed or is entitled to appoint a member of the said board as it is constituted at the time of the adoption of the said resolution setting forth and approving the proposed amendment.

(3) If a governing body to which the proposed amendment is submitted shall find that the said amendment is in the public interest, and prima facie proof that it is in the public interest shall consist of proof that it has been approved by the Alabama mental health board, it shall adopt a resolution approving the said amendment, if any governing body to which the proposed amendment was submitted shall find that the said amendment is not in the public interest, it shall adopt a resolution disapproving the said amendment.

(4) A proposed amendment shall become effective immediately upon its being filed in the office of the judge of probate of the county in which the said principal office is located, and if the amendment provides for a change in the location of the principal office, it shall become effective immediately upon the filing of the original certification of incorporation, together with the amendment thereto, in

the office of the judge of probate of the county in which the said principal office is to be relocated, as shown by the said amendment. (Acts 1967, No. 310, p. 853, § 11.)

§ 22-51-8. Board of directors—Composition; appointment, qualifications, terms and compensation of members; vacancies; executive committee.

Each corporation shall be governed by a board of directors of nine or more members, selected as provided in this section. Each governing body which authorized the formation of the corporation shall appoint three members of the said board of directors; provided, that if the area to be served by the corporation shall be located wholly within an area governed by a single governing body, the said governing body shall appoint nine members to the said board; provided further, that if the said area to be served shall be located wholly within an area governed by at least two, but not more than two, governing bodies, each of the said governing bodies shall be entitled to appoint five members of the said board. If there are more than 16 directors, they shall appoint from among their number an executive committee consisting of nine members, which shall have and exercise the powers and authority of the board of directors, subject to the general supervision and control of the said board. Every member of the board of directors must be a resident of the area which he represents and which is to be served by the proposed facilities. The terms of the initial members of the board appointed by the governing bodies, as provided above, shall begin immediately upon their appointments and shall end at noon on April 1 of the succeeding odd-numbered calendar years following the appointments as designated by said governing body at the time of their said appointments. Thereafter, the term of office of each director shall be six years. The terms of office of the said directors shall be arranged so that the terms of office of approximately one third of all directors will end at noon on April 1, in each odd-numbered calendar year. A member of the board of directors shall hold office until his successor has been appointed and qualified. The respective appointing authorities shall appoint or reappoint a qualified person as a member of the board of directors whenever a member's term expires or whenever a position becomes vacant for any other reason. A member of the board of directors shall receive no compensation for his services. (Acts 1967, No. 310, p. 853, § 7.)

§ 22-51-9. Same—Meetings; quorum; constitution and bylaws.

The board of directors shall hold monthly meetings and such special meetings as may be called, from time to time, on at least two days' notice given by the chairman or by any three members thereof, said notice to be given to each member thereof; provided that where the board of directors exceeds 16 members, the executive committee shall meet at least monthly and the complete board of directors shall meet at least every six months. The said board shall adopt a constitution and bylaws, to be subject to this chapter, the certificate of incorporation and laws of the state of Alabama. Three members of the said board shall constitute a quorum for the transaction of business. A copy of the constitution and bylaws shall also be filed with the Alabama mental health board. (Acts 1967, No. 310, p. 853, § 8.)

§ 22-51-10. Professional advisory committee.

The board of directors of the corporation shall appoint a professional advisory committee of three or more members, one of which must be a physician practicing in the area of the board's jurisdiction. (Acts 1967, No. 310, p. 853, § 9.)

§ 22-51-11. Powers of corporation.

Any corporation organized pursuant to the provisions of this chapter, is hereby authorized and empowered to exercise the following powers in addition to others granted in this chapter:

(1) To construct and maintain facilities as defined in section 22-51-4;

(2) To cooperate and contract with the state board of health for the construction of such facilities;

(3) To cooperate and contract with the Alabama mental health board for the construction, operation and maintenance of such facilities and for the operation and execution of such programs as it has elected to implement;

(4) To take over by purchase, lease or otherwise any hospital or other facilities to be used for carrying out such programs as it has elected to implement;

(5) To arrange with any appropriate local or state agencies for the opening or closing of streets, roadways, alleys or other rights-of-way or easements and to exercise the power of eminent domain;

(6) To purchase, lease or rent any land, building, structure or facilities needed in its operations;

(7) To enter upon buildings or property in order to conduct investigations or to make surveys or soundings;

(8) To obtain options upon, and to acquire by purchase, gift, grant, bequest, devise or otherwise, any property, or interest therein, from any person;

(9) To sell, exchange, transfer, assign or pledge any property, or any interest therein, to any person;

(10) To improve any such property;

(11) To insure against such risks as it may deem advisable;

(12) To borrow money upon its bonds, notes, warrants, debentures or other evidences of indebtedness and to secure the same by pledges of its revenues;

(13) To have perpetual succession;

(14) To make and execute contracts and other instruments necessary or convenient to the exercise of its powers;

(15) To determine reasonable fees for services which it makes available to the public and collect such fees, unless, on application and investigation, it is determined that the person receiving such services is unable to pay the established fee, and in such case, such amount as he is able to pay will be collected;

(16) To make and from time to time amend and repeal bylaws, rules and regulations not inconsistent with this chapter;

(17) To carry into effect the powers and purposes conferred by this chapter; and

(18) To do any and all other things necessary or convenient to carry out the powers given in this chapter. (Acts 1967, No. 310, p. 853, § 10.)

§ 22-51-12. Control of facilities and programs.

Nothing in this chapter shall be construed to mean that the facilities and programs provided for in this chapter are to be under the direction or control of any person other than the board of directors appointed by the governing bodies, as provided in section 22-51-8, as long as said board of directors complies with the minimum standards of construction, maintenance and operation adopted by the state board of health and the minimum standards and criteria established by the Alabama mental health board. (Acts 1967, No. 310, p. 853, § 13.)

§ 22-51-13. Taxation exemption.

The corporations authorized in this chapter and their property, including bonds, conveyances, mortgages, leases and deeds, and all income from such property and the operation of programs shall be exempt from all taxation and no excise tax may be imposed on any corporation for the privilege of engaging in any of the activities authorized by this chapter; provided, that the corporation must adhere to minimum standards for licensure as provided by chapter 50 of this title. (Acts 1967, No. 310, p. 853, § 14.)

§ 22-51-14. Appropriations by local governing bodies.

The governing bodies which are entitled to appoint a member of the board of directors are hereby authorized to appropriate their respective shares of the cost of construction of the facilities as determined upon by agreement between the board of directors and the respective governing bodies and the said governing bodies are hereby autnorized to appropriate their respective shares of the cost of operating such programs as the corporation shall have elected to implement, as determined by agreement between the Alabama mental health board, the board of directors and the respective governing bodies, notwithstanding the fact that the said facilities may be located in a county other than the county whose governing body makes the said appropriations. (Acts 1967, No. 310, p. 853, § 12.)

CODE OF ALABAMA 1975
TITLE 22

CHAPTER 50.

Department of Mental Health and Mental Health Board.

* * *

§ 22-50-17. Certificate or license required to operate facility for care or treatment of mental or emotional illness.

No person, partnership, corporation or association of persons shall operate a facility or institution for the care or treatment of any kind of mental or emotional illness as defined in this chapter, without being certified by the board or licensed by the state board of health; provided, that nothing in this section shall be construed so as to require a duly authorized physician, psychiatrist, psychologist, social worker or Christian Science practitioner to obtain a license for treatment of patients in his private office, unless he keeps two or more patients in his office for continuous periods of 24 hours or more in one week. (Acts 1967, No. 881, p. 1649, § 12.)

STANDARDS FOR COMMUNITY MENTAL HEALTH CENTERS

[SEAL]

ADOPTED BY THE
ALABAMA MENTAL HEALTH BOARD FEBRUARY 18, 1971

THIRD REVISION: JUNE, 1978

INTRODUCTION

The standards presented herein have been developed through the combined efforts of the Division of Mental Illness, the community mental health center personnel, and other interested parties. The standards for Alcoholism, Drug Abuse and Mental Retardation are promulgated by those respective divisions. Efforts are made to assure that all standards are compatible. Development, promulgation, and monitoring standards for mental health centers serve the following three purposes:

1. To fulfill the responsibility vested in the Department by Act 881 to monitor and certify community mental health centers.
2. To assure basic quantity and quality of services and their delivery.
3. To improve communication between the Department of Mental Health and the community mental health centers.

Basic Requirements

Each community mental health center must operate under the auspices of a public or private non-profit agency established for that purpose and whose program has been approved by the Alabama Mental Health Board. Such agency may be: a public non-profit corporation, organized under the provisions of Act 310 (1967 Alabama Legislature); a private non-profit corporation, incorporated in compliance with Act 578 (1955 Alabama Legislature); or any other public agency created by the law within the State of Alabama.

All community mental health centers shall offer at a minimum outpatient services, consultation and education services, precare and aftercare services and emergency services.

Applicability

These standards shall apply to all community mental health centers in the State of Alabama. Where there are contractual provisions, regulations, or standards promulgated for the operation of specific services as part of a grant or contract, they shall be executed in addition to the standards listed herein. Community mental health centers shall also comply with all applicable federal, state, and local health, safety, and fire standards.

Monitoring and Certification

Compliance with the standards listed herein will be monitored through site visit reviews. Whenever possible, reviews will be coordinated with appropriate federal and state agencies and regional mental health boards.

An interdisciplinary team will be used for reviews. The composition and size of the team will be determined by the size and structure of the center to be reviewed.

After the on-site visit, a report will be prepared by the team and sent to the center board of directors and other agencies and personnel as appropriate. Within ninety days from receipt of the report, the center will respond to the Department of Mental Health with an action plan which addresses the recommendations of the team. Upon receipt, review, and approval of the action plan by the Department of Mental Health, the center will be certified.

Certification will be granted on the basis of substantial compliance with the applicable standards as listed herein. if the center is not approved for certification, a copy of the report, defining the deficiencies which must be removed before the center can be certified, is sent to the president of the board, the executive officer and other appropriate individuals and agencies.

If a center is not awarded certification, legal action authorized by Act 881 may be initiated.

Appeal

In cases where certification is denied, or there is disagreement with major findings, appeals may be made in writing to the Director of the Division of Mental Illness, Department of Mental Health. If an appeal is not satisfactorily resolved by the director's office, a final appeal may then be made to the Commissioner of Mental Health.

I. *Mental Health Center Board*

A. *Board Organization*

1. Each community mental health center shall operate under the auspices of a public or private non-profit agency whose function as a community mental health center board is approved by the Alabama Mental Health Board. Such community mental health center boards may be one of the following
    a. A public non-profit corporation, organized under the provisions of Act 310 (1967 Alabama Legislature);
    b. A private non-profit corporation, incorporated in compliance with Act 578 (1955 Alabama Legislature);
    c. Any other public agency created by law within the State of Alabama.
2. When applicable, mental health center boards shall operate under the authority of the regional mental health/mental retardation board (Act 310) which serves as the legal entity for the planning, developing, delivering, and/or monitoring of mental health services at the community level.
3. The community mental health center board shall be organized in such a way as to identify and define the responsibilities of all officers, members, and standing committees.
4. The board, if incorporated under Act 310 or Act 578, shall have available written Articles of Incorporation

which are in accordance with the law authorizing the formation of a board.

5. Proposed changes to the Articles of Incorporation of the board shall be submitted to the Alabama Mental Health Board for approval prior to submission to the governing body/appointing authority for approval, if applicable, and before filing with the Probate Court of the county where the principal office is located.

* * *

D. ***Board Meetings***

1. Minutes of board meetings and any hearings, including attachments, shall be submitted to the Department of Mental Health and the regional mental health board (where applicable) as soon as they are approved by the board.
2. Minutes of all meetings shall reflect: a) attendance by name, b) reports of clinical and administrative activities, c) actions taken, d) a review and follow-up of previously tabled discussions.
3. The executive officer, or a representative, shall attend all board meetings.

* * *

E. ***Board Responsibilities***

1. The board shall be responsible for:
    a. provision of adequate resources including funds, space, staff, and equipment to operate the programs of the center;
    b. establishment of goals and priorities of the center;
    c. adequacy and quality of services;
    d. establishment of policies and written approval of policy revisions;
    e. delegation of authority for the day-to-day center operations to the executive officer;

   f. supervision of policy implementation;
   g. coordination of planning efforts with appropriate agencies;
   h. provision of adequate insurance to protect the physical and financial resources of the center, the employees, and the board members.

2. No assignment, referral, or delegation of authority to center staff shall excuse the board from its legal, financial, and supervisory responsibilities.
3. Where applicable, the mental health center board shall submit its programs and facility plans through the regional mental health board for its review and approval prior to seeking approval from the Department of Mental Health.

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage-Hour Division
Office of the Area Director
474 South Court Street — Aronov Building, Room 130
Montgomery, Alabama 36104

February 23, 1977

Status of Employees of Community Mental Health
Centers under the Fair Labor Standards Act

Ms. Molly M. Brooms, Coordinator
Technical Assistance
State of Alabama
Department of Mental Health
502 Washington Avenue
Montgomery, Alabama 36130

This refers to your recent letter asking the present status of employees of community mental health centers under the Fair Labor Standards Act.

On June 24, 1976 the Supreme Court in the case of *National League of Cities* v. *Usery* held that the minimum wage and overtime provisions of the Fair Labor Standards Act do not apply to State and local government employees engaged in activities which are an integral part of traditional government services. It appears that employees of community mental health centers are engaged in such services and are no longer subject to these requirements.

It is our position that the Age Discrimination in Employment Act and Equal Pay Act still apply to State and local governments.

We hope this answers your question. If we can be of further service, please let us know.

James A. Tucker
JAMES A. TUCKER
Area Director

RECEIVED
February 24, 1977
Department of Mental Health
Division of Mental Illness

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage-Hour Division
Office of the Area Director
474 South Court Street — Room 130
Montgomery, Alabama 36104

May 22, 1979

State of Alabama Department of Mental Health
Montgomery, Alabama

Mr. Edward Strachan, Programs Coordinator
Title XX Residential Care Services
for the Mentally Ill
State of Alabama Department of Mental Health
135 South Union Street
Montgomery, Alabama 36130

This is in response to your letter of May 17, 1979, and in further reference to your letter of March 13, 1979 and my answer on March 15, 1979. In your recent letter you indicated that more than fifty percent of the residents of the Mental Health halfway houses have an IQ of more than 69. Furthermore, the majority are able to cook, wash their own clothes, etc. You asked if the program would be subject to the Fair Labor Standards Act based on this information.

The answer is no. As I said in my letter of March 15, 1979, more than fifty percent of the residents would have to have an IQ of 69 or less for the establishment to be subject to the law.

Since the establishment would not be subject to the Act under the circumstances described above, neither would the home manager or any other employee of the establishment be subject to the wage provisions of the law.

I hope this will clarify your questions. If not, please let me know.

James A. Tucker
JAMES A. TUCKER
Area Director

RECEIVED
May 24, 1979
Division of Transitional Services
Department of Mental Health

RECEIVED
SEP - 9 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 82 - 207
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

EASTSIDE MENTAL HEALTH CENTER, INC.

Petitioner

v

DAVID R. WILLIAMS,

Respondent

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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for Respondent Williams

Wythe W. Holt, Jr.
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Questions Presented

1. Is a non-profit corporation under contract with the State to provide community mental health services entitled to immunity from the Fair Labor Standards Act?

2. Is such a non-profit corporation performing an "integral operation in an area of traditional governmental function?"

Parties

The Petitioner incorrectly shows that only itself and David Williams are parties. The Secretary of Labor was allowed to intervene as a party in the Court of Appeals shortly before the oral argument and should therefore be a respondent in this Court. See Order of 4 December 1981.

Table of Contents

Questions Presented 2

Parties 2

Table of Contents 3

Table of Citations 3

The Writ Should Be Denied

I. Eastside is not acting as "the State." 4

II. Eastside does not perform an "integral state operation in an area of a traditional governmental function." 9

Conclusion 10

Table of Citations

Cases:

Amersbach v City of Cleveland, 528 F2d 1033 (6th Cir 1979) 9

Hodel v Virginia Surface Mining and Reclamation Association, 452 US 264 (1981) 4

Jackson v Metropolitan Edison Co., 419 US 345 7

National League of Cities v Usery, 424 US 833 (1976) 4

Rendell-Baker v Kohn, ___US__, 50 USLW 4824 (25 June 1982) 7

Other:

Ala Code §22-51-1 et seq. 5-6

Ala Code §35-4-29 6

NO. 82 - 207
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SUPREME COURT OF THE UNITED STATES
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EASTSIDE MENTAL HEALTH CENTER, INC.

Petitioner

v

DAVID R. WILLIAMS,

Respondent

The Writ Should be Denied

Before the Eastside Mental Health Center may claim an exemption from the Fair Labor Standards Act, it must satisfy three requirements:

> First, there must be a showing that the challenged statute regulates the "States as States." *** Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *** And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

Hodel v Virginia Surface Mining and Reclamation Association, 452 US 264, ___, 69 LEd2d 1, 23 (1981); see also, National League of Cities v Usery, 424 US 833, 837, 841, 844 (1976). Since a ruling in favor of Eastside is required on all three before it may claim the exemption, the Circuit Court's rulings on these factors should be considered alternative holdings.

I. EASTSIDE IS NOT ACTING AS "THE STATE."

Eastside apparently wants this Court to review the decision below to overturn the Circuit Court's use of the NLRB's political subdivision test. Eastside complains about both the applicability of the test and the correctness of its application.

The purpose of the NLRB test is to determine whether a particular entity is a governmental unit. One way of determining this is to look at the orgnizational structure of the entity. The Court of Appeals found that Eastside had been organized as a non-profit corporation and was therefore not a state agency. Eastside now argues that "the mere fortuity of Eastside's incorporation under Alabama's general non-profit statute" should not make it a private employer, but that it should be treated as an "Act 310 corporation" even thought it was not established under that Act, Petition at 12. A brief survey of that Act and the actual incorporation of Eastside Mental Health Center shows how incorrect this is.

Act 310, now codified as Ala Code §22-51-1 et seq. (see Petition at 39a-49a), provides for the formation of public corporations to contract with the state Mental Health Board to perform certain mental health services. The prerequisites to incorporation under Act 310 are more detailed and onerous than those of private for-profit or not-for-profit corporations: the incorporators must seek and receive permission to incorporate from "each [public] governing body" in whose area they desire to operate. Ala Code §22-51-3. Proposed amendments to the certificate of incorporation must be approved by the same public governing bodies and the Alabama Mental Health Board. Ala Code §22-51-7.

Eastside was not incorporated under Act 310;[1] it was incorporated under the general non-profit corporation statute by four natural persons,[2] without seeking approval of local governments. The certificate of incorporation does not state that Eastside is a subsidiary of, or controlled by, any other corporation or governmental entity.

The State of Alabama must have had a reason for requiring more prerequisites for incorporation of public corporations than for private non-profit corporations. These might have included the desire to have local governments approve of such corporations and their plans. Eastside has avoided all these safeguards by incorporating as a private non-profit corporation, but claims that it still enjoys the benefits of being a public corporation. In short, Eastside claims the privileges and immunities of a public corporation even though it has not complied with state law to become such a public entity.

---

[1] Eastside alleges that "the State limited the number of Act 310 corporations that could exist," Petition at 3, but such a limitation does not appear in Act 310, nor does Eastside explain where it is found.

[2] One of these, Homer A. Jackson, Jr., had the words "Jefferson-Blount-St.Clair Mental Health Authority, Inc." typed beneath his signature. There is no indication of Jackson's position with, or authorization by, the Authority. The notary's certificate does not indicate that Jackson was acting for a corporation. In Alabama, the verification on a deed or certificate of incorporation must clearly state the capacity in which the person has executed the instrument. See, Forms of Acknowledgment in Ala Code §35-4-29.

The same decision (as to Eastside's status) would have been reached if the Circuit Court had applied the Fourteenth Amendment "state action" test. Rendell-Baker v Kohn, ___US__, 50 USLW 4824 (25 June 1982), provides an excellent analytical tool in this context. Ms. Rendell-Baker's employer was a non-profit, private school under contract with the Boston and Brookline school systems. Although "[t]he State ha[d] issued detailed regulations concerning matters ranging from recordkeeping to student-teacher ratios," the personnel policies of the school were not State-mandated. 50 USLW at 4826. Because the State had not required the school to discharge Ms. Rendell-Baker, this Court held that the action of the school in discharging her was not attributable to the State. The Court reaffirmed the principle that, in the absence of a "sufficiently close nexus between the State and **the challenged action** of the regulated entity," the regulated entity's action may not be attributed to the State. Jackson v Metropolitan Edison Co., 419 US 345, 350 (emphasis added).

In the present case, there is extensive regulation of Eastside by means of State Mental Health Board regulations, Petition at 51a-55a, and a contract with the Jefferson-Blount-St. Clair Mental Health/Mental Retardation Authority.[3] However,

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(cont.)

[3] Brian McManus, Director of Eastside, testified as follows:

> Q. Is [Eastside] responsible to any other agency in terms of reporting what it does or getting permission to do things?
>
> A. It's very, very complex. We have many, many funding sources, and because we have many and varied funding sources, we have to abide by the rules of the funding agencies. All of our revenues except one are contracts for services. The Federal Government grants us money, and by

neither the Department of Mental Health nor the Jefferson Authority told Eastside how much to pay David Williams or what his working hours should be.[4] Thus the State should not be charged with responsibility for Eastside's conduct, nor should Eastside be allowed to escape liability by hiding behind the State.

The Fourteenth Amendment "state action" cases should be used to determine the existence of the first part of the Usery-Hodel test. Otherwise, there could arise the anomolous situation that an agency's personnel policies might be exempt from the FLSA because it was performing a state function and, at the same time, exempt from the Fourteenth Amendment because it was not engaged in "state action."

(cont.) virtue of that grant, we're subject to numerous rules and regulations set forth as a condition of that grant. *** The State Department of Mental Health actually contracts with a superordinate agency here in Jefferson County called the Jefferson, Blount, and Saint Clair Mental Health and Retardation Authority, who in turn subcontract with us.

McManus deposition of 16 June 1979 at 8-9.

[4] Brian McManus testifed as follows:

Q. (by Eastside's attorney) All right. And are these transitional home duties and salaries and other matters governed by or based on federal and state guidelines and regulation?

A. No.

McManus deposition of 16 June 1979 at 32.

II. EASTSIDE DOES NOT PERFORM AN "INTEGRAL STATE OPERATION IN AN AREA OF A TRADITIONAL GOVERNMENTAL FUNCTION."

The opinion of the Court of Appeals makes clear that the portion of the opinion relating to "integral state operations" is dicta:

> For this reason it is not necessary for us to consider the extent of the FSLA's effect on Eastside's function of granting mental health services, nor need we decide whether such a function is traditional or essential.

Petition at 18a. Nevertheless, Eastside has devoted a large part of its Petition to complaining about the test used by the Court of Appeals and comparing it to tests utilized by the First, Fifth, and Sixth Circuits. Once again it has not argued that the use of any other test will change the result.

Under the test enunciated in Amersbach v City of Cleveland, 528 F2d 1033 (6th Cir 1979), mental health services would not be "integral" because government is not the principal provider of the service, nor is government particularly well-suited to provide such services. In fact, 81% of general hospitals providing psychiatric services are non-governmental.[5]

Eastside asserts that complying with the FLSA by paying David Williams back wages and damages will place "a substantial economic burden" on the State.[6] Like the coal mine operators in *Hodel*, Eastside believes that a cost to the State automatically means that the federal regulation is wrong. This Court rejected that proposition in *Hodel*, 452 US at ___, 69 LEd2d at 26 n.33. Substantial economic effects are not proof of integral state operations.

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[5] National Institute of Mental Health, "Emergency Services in Psychiatric Facilities, United States, January 1974," Statistical Note No. 128, (Washington : Government Printing Office, 1976).

---

[6] Eastside's cost figures are suspect. First, David Williams is not owed $27,000 in back wages, but $27,000 in liquidated damages and wages. Second, there is nothing in the record that shows that any other organizations use the same work schedule that Eastside does. Third, there is no support for the $700,000 figure asserted in Petition, n.11; this figure first appeared in a brief in suport of rehearing in the Court of Apeals, but nowhere is there evidence to show how it was calculated.

CONCLUSION

For the reasons set out in this brief, the Court should deny the Petition for Writ of Certiorari.

Eastside is incorrect in its argument that it should be treated like a political subdivision. The evidence shows that it was correctly characterized by the Circuit Court as a private, non-profit corporation, and that the same decision would have been reached if the Court had applied other analyses. Eastside is also incorrect in asserting that it performs an integral state function. Neither the facts nor the law support its position.

Submitted by,

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(admitted as Wilson Edward Still Jr.)

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Washington DC 20052

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982
No 82 - 207

EASTSIDE MENTAL HEALTH CENTER,

Petitioner,

vs

DAVID R. WILLIAMS,

Respondent

Certificate of Service

I the undersigned counsel of record hereby certify that I have mailed, postage prepaid, a copy of the Motion for Leave to Proceed In Forma Pauperis and a copy of the Brief in Opposition to each of the following:

John G. DeGooyer, Esq., Michael K. Wyatt, Esq., Hamel Parks McCabe and Saunders, 888 16th Street NW, Washington DC 20006

Frank O. Hanson Jr, Esq., Emond and Vines, 1800 City Federal Bldg, Birmingham AL 35203

Hon. Rex E. Lee, United States Solicitor General, U.S. Department of Justice, Room 5143, Tenth and Constitution Ave. NW, Washington DC 20530

Beate Bloch, Esq., Associate Solicitor of Labor, US Department of Labor, Room N-2716, 200 Constitution Avenue NW, Washington DC 20210

I further certify that all parties required to be served have been served.

Certificate of Mailing

I certify that I mailed a copy of the Brief in Opposition to Certiorari at or before 5 pm on the 7th day of September 1982, correctly addressed to the Clerk of the Supreme Court and with first class postage affixed.

Under penalty of perjury, I affirm the foregoing statement is true and correct. Executed this 7th day of September 1982.

Edward Still

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982
No 82 - 207

EASTSIDE MENTAL HEALTH CENTER,

Petitioner,

vs

DAVID R. WILLIAMS,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent David Williams asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis. No motion to proceed in forma pauperis was filed in the courts below.

The respondent's affidavit in support of this motion is attached hereto.

Submitted by

Edward Still
(admitted as Wilson Edward Still Jr.)
Suite 400 Commerce Center
2027 1st Avenue North
Birmingham AL 35203
205/322-6632
Attorney for Respondent.

RECEIVED JUN 1 4 1982

In the Supreme Court
of the United States
NO 82-207

Eastside Mental Health Center

v

David Williams

Affidavit in Support of Motion To Proceed in Forma Pauperis

I, David Williams, hereby depose and say that I am the appellee or respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; costs or give security therefor that I believe I am entitled to redress.

1. Are you presently employed? No State the date of your last employment and the amount of salary and wages per month which you received. I was last employed on 12 December 1981 by Gregory Salisbury Metal Products, 805 S., Front St. New Orleans, LA 70130, at $211.25 per month.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form or rent payments, interest, dividends, or other source? Yes. Describe each source of income, and state the amount received from each during the past twelve months. I have been engaged in miscellaneous carpentry work, but have not received net income from it.

3. Do your own any cash or checking or savings account? Yes. State the total value of the items owned. $1721.01.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?. Yes. Describe the property and state its approximate value. Carpentry or construction tools worth $200-300.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Under penalty of perjury, I affirm that the foregoing statementis true and correct. Executed this 12th day of June 1982.

David Williams

David Williams

Office-Supreme Court, U.S.
FILED
OCT 8 1982
ALEXANDER L. STEVAS

No. 82-207

In the Supreme Court of the United States

OCTOBER TERM, 1982

EASTSIDE MENTAL HEALTH CENTER, INC., PETITIONER

v.

DAVID R. WILLIAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the doctrine of intergovernmental immunity recognized in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), precludes application of the minimum wage and overtime provisions of the Fair Labor Standards Act to an employee of a non-profit corporation that contracts with state and local governmental bodies to provide mental health services.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 6

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Amersbach v. *City of Cleveland*, 598 F. 2d 1033 .... 3, 13, 14

Blum v. *Yaretsky*, No. 80-1952 (June 25, 1982) 11

California v. *Sierra Club*, 451 U.S. 287 13

Donovan v. *Richland County Association for Retarded Citizens*, 454 U.S. 389 14

Hodel v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 265 .... 4, 5-6, 7, 8, 10, 14-15

Mitchell v. *Singstad*, 177 F. Supp. 376 11

Molina-Estrada v. *Puerto Rico Highway Authority*, 680 F. 2d 841 14

NLRB v. *Highview, Inc.*, 590 F. 2d 174 14

NLRB v. *Natural Gas Utility District*, 402 U.S. 600 .... 12, 13

Page

Cases—Continued:

National League of Cities v. *Usery*, 426 U.S. 833 .... 3, 6, 7, 8, 9, 10, 12

Powell v. *United States Cartridge Co.*, 339 U.S. 497 11

Public Building Authority v. *Goldberg*, 298 F. 2d 367 11

Rendell-Baker v. *Kohn*, No. 80-2102 (June 25, 1982) 11

Richland County Association For Retarded Citizens v. *Donovan*, 91 Lab. Cas. (CCH) para. 34,018 14

Richland County Association For Retarded Citizens v. *Marshall*, 660 F. 2d 388, vacated and remanded for lack of jurisdiction, 454 U.S. 389 .... 9, 14

United States v. *New Mexico*, No. 80-702 (Mar. 24, 1982) 11

United Transportation Union v. *Long Island R.R.*, No. 80-1925 (Mar. 24, 1982) 8, 9, 13

Walling v. *Craig*, 53 F. Supp. 479 11

Walling v. *McCrady Construction Co.*, 60 F. Supp. 243, aff'd, 156 F. 2d 932, cert. denied, 329 U.S. 785 11

Walling v. *New Orleans Private Patrol Service, Inc.*, 57 F. Supp. 143 11

Washington v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 11

Page

Constitution and statutes:

United States Constitution,
Fourteenth Amendment 11

Fair Labor Standards Act of 1938, 29 U.S.C.
201 *et seq.* 3, 5, 7, 9, 10, 11, 13, 14

Section 3(d), 29 U.S.C. (1964 ed.)
203(d) 11

Section 16(b), 29 U.S.C. 216(b) 3

National Labor Relations Act,
29 U.S.C. 152(2) 12

42 U.S.C. 1983 11

Ala. Code:

§ 10-3-1 (repl. 1980) 2

§ 22-1-1 (1975) 2

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-207

EASTSIDE MENTAL HEALTH CENTER, INC., PETITIONER

v.

DAVID R. WILLIAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-21a) is reported at 669 F.2d 671. The opinions of the district court (Pet. App. 22a-36a) are reported at 509 F. Supp. 579.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1982. A petition for rehearing was denied on May 13, 1982 (Pet. App. 1a). The petition for a writ of certiorari was filed on August 5, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The Secretary of Labor was granted intervention in the court of appeals pursuant to 28 U.S.C. 2403 and accordingly is a respondent in this Court.

STATEMENT

1. Petitioner is a non-profit corporation established under Ala. Code § 10-3-1 (repl. 1980) (Pet. App. 6a). Pursuant to contracts with the State of Alabama and local governmental bodies, petitioner provides various outpatient, emergency, and inpatient mental health services (*id.* at 8a). Petitioner has its own articles of incorporation, by-laws, and board of directors. The board manages the Center and hires and fires the Center's administrative staff (*id.* at 6a-7a).

Pursuant to petitioner's by-laws, some of the Center's directors are appointed by public or governmental entities and others by private non-profit entities (see Pet. App. 7a & n.4). It is undisputed that, though appointed by outside bodies, the directors do not sit as representatives of their appointing agencies and may not be removed by their appointing agencies (*id.* at 7a).

Before its establishment as a non-profit corporation in 1975, petitioner was part of the Jefferson-Blount-St. Clair Mental Health Authority, a public corporation established under Ala. Code § 22-1-1 (1975), which coordinates mental health care in a three-county region (Pet. App. 5a-6a). When the Authority, which disburses state funds to all medical health centers within its catchment area, faced conflict of interest charges from other community mental health centers within the region that compete with petitioner for funds, petitioner was reestablished as a separate entity at "arm's-length" from the Jefferson Authority (*id.* at 6a). Because state law or policy limited the number of Section 22-1-1 public corporations operating in a particular political subdivision, petitioner was established as a non-profit corporation rather than as a separate public corporation (*id.* at 7a).

Petitioner, like all mental health centers in Alabama, is subject to considerable state regulation. This oversight arises from petitioner's own articles of incorporation and by-laws, state standards applicable to all licensees, and contracts petitioner has entered with state agencies for the provision of services (Pet. App. 8a). For example, the Center must be state certified; its accounts are subject to audit by state (and federal) officials;[2] and changes in petitioner's articles of incorporation must be approved by the Alabama Health Board and the Authority. Pursuant to petitioner's by-laws the Authority reviews board member appointments and certain aspects of petitioner's budget (*ibid.*).

2. Between February 1977 and May 1979 respondent Williams was employed as the resident manager of a halfway house mental health services facility operated by petitioner. He thereafter instituted this suit for back pay under Section 16(b) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 216(b), in the United States District Court for the Northern District of Alabama. The district court granted petitioner's motion for summary judgment (Pet. App. 30a-31a), reasoning that, under *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), petitioner is exempt from the FLSA's requirements because it "provides a traditional government function" (Pet. App. 35a). Upon Williams' motion for reconsideration, the district court reaffirmed its prior determination (*id.* at 22a). The district court concluded that petitioner is constitutionally immune from application of the FLSA irrespective of whether it constitutes a political subdivision of the State of Alabama, because the function it performs is an essentially governmental one, under criteria devised by the Sixth Circuit in *Amersbach* v. *City of Cleveland*, 598 F.2d 1033, 1037 (1979).

---

[2] At the pertinent time petitioner received about 38% of its funds from the federal government (Pet. App. 8a).

Alternatively, the district court concluded that petitioner is a political subdivision of the State invested with intergovernmental immunity because "its administrators are responsible to public officials" (Pet. App. 26a).

The court of appeals reversed (Pet. App. 3a-21a). Applying this Court's decisions in *National League of Cities* v. *Usery, supra,* and *Hodel* v. *Virginia Surface Mining & Reclamation Association,* 452 U.S. 264 (1981), the court of appeals stated that the "determinative fact in this case is simply that the entity with which we are dealing is not a state or a political subdivision of a state" (Pet. App. 15a). In concluding that petitioner does not share in the intergovernmental immunity of the State of Alabama, the court of appeals noted that petitioner is not an agency of the State, that unlike most community mental health centers in Alabama petitioner is, as a matter of state law, a private non-profit corporation, rather than a public corporation, and that petitioner's employees are not employees of the State or its agencies (*id.* at 15a-16a). Nor, in the court of appeals' view, did other controls exercised by the State of Alabama and its agencies and subdivisions convert petitioner into a state governmental entity (*id.* at 16a-17a).

The court of appeals observed that state regulation and licensing of community mental health centers is a normal incident of police power regulation of private entities in an area affected by public interest. The court regarded the participation of the Jefferson Authority and other agencies of the State and its subdivisions in the appointment of petitioner's directors as no more than a special kind of police power regulation, because the board's membership also included appointees of private entities, and because even the appointees of public agencies do not serve as representatives of the appointing agencies and are not subject to dismissal by those agencies.[3] The court of appeals concluded (Pet. App. 16a):

> For purposes of the sovereignty issue before us, Eastside is * * * best characterized as a private, nonprofit corporation, licensed in the State of Alabama to perform the services of a community mental health center, and carrying out such services by means of ordinary contracts with various state and local agencies and institutions. It is thus analogous to a normal nonprofit institution in its basic corporate structure, while at the same time analogous to a private business doing contracting work for the state in its basic business operations.

Petitioner's nongovernmental status precluded participation in the State's intergovernmental immunity (*id.* at 15a):

> For whatever reason, Alabama did not elect to operate Eastside as a state institution with state employees; instead it set up a not for profit corporation with a separate independent board of directors to administer it. Whatever may have been the state's reason for doing it this way, it must live with the consequences. It cannot claim an immunity based on a condition which it itself sought to avoid.

Because petitioner was determined not to be an agency or political subdivision of the State, the court of appeals concluded that application of the FLSA to respondent Williams' employment would not constitute regulation of "States as States" (*Hodel* v. *Virginia Surface Mining &*

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[3] The court of appeals noted that although petitioner is accorded exemption from the state sales tax and its employees participate in the state retirement system, neither privilege is restricted, under state law, to governmental entities (Pet. App. 17a & n.9).

Reclamation Association, supra, 452 U.S. at 287, quoting *National League of Cities* v. *Usery, supra,* 426 U.S. at 854). This conclusion, the court explained (Pet. App. 18a), was "sufficient under the *Hodel* test for us to hold that [petitioner] may not be exempt from the FLSA," and made it unnecessary to "consider the extent of the FLSA's effect on Eastside's function of granting mental health services * * * [or to] decide whether such function is traditional or essential."[4]

ARGUMENT

In *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), this Court held that the "constitutional doctrine of intergovernmental immunity" (*id.* at 837) bars application of the minimum-wage and overtime provisions of the Fair Labor Standards Act to "the States *qua* States" (*id.* at 847), "insofar as [it] operate[s] to directly displace the State's freedom to structure integral operations in areas of traditional governmental functions" (*id.* at 852). In *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.,* 452 U.S. 264, 287-288 (1981), the Court summarized the relevant principles:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each*

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[4] The court of appeals nevertheless proceeded to comment on those issues (Pet. App. 18a-20a), explaining that "even if the State of Alabama had chosen to operate Eastside as a state agency, the Center is not performing an 'integral' [governmental] function and thus the *Usery* exemption would not apply" (*id.* at 18a). The court explained that because the services provided by petitioner, unlike those considered in *National League of Cities* v. *Usery, supra,* relate to only a limited sector of society, state sovereignty would not be implicated in that hypothetical situation. Judge Hill concurred specially (Pet. App. 20a-21a), endorsing the court's judgment of reversal, but reserving decision on the hypothetical situation discussed by the other members of the panel and stressing that there was no need to decide that question.

> of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty" [426 U.S.] at 845. And third, it must be apparent that the State's compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." [426 U.S.] at 852. [Emphasis in original.]

In light of this teaching, the court of appeals correctly concluded that petitioner is not constitutionally immune from FLSA wage requirements because it is not an agency or political subdivision of a state. This decision does not conflict with any ruling of another court of appeals and does not warrant this Court's review.

1. The court of appeals correctly recognized that the threshold question presented in this case is whether petitioner should be characterized for purposes of the intergovernmental immunity doctrine as an agency of one of the "States [or] their political subdivisions" (*National League of Cities* v. *Usery, supra,* 426 U.S. at 855 & n.20). That much is clearly reflected in the Court's opinion in *National League of Cities* itself. *Id.* at 847, 852, 854, 855 & n.20. And it is the explicit holding of *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra,* 452 U.S. at 287, that no claim of intergovernmental immunity may prevail without establishing "*each*" of the necessary elements, including that the statute challenged directly "regulates the 'States as States'" (quoting *National League of Cities* v. *Usery, supra,* 426 U.S. at 854). Thus, petitioner's assertion, echoing the district court (Pet. 11, quoting Pet. App. 27a; emphasis supplied by petitioner), that the relevant issue is "whether [it] provides a traditional government service,

not merely whether or not it is a political subdivision or public corporation" is squarely contrary to the holding of *Hodel*.[5]

Contrary to petitioner's suggestion, endorsed by the amici curiae, the court of appeals' refusal to extend intergovernmental immunity to nongovernmental entities generally was neither "formalistic" nor inappropriate. Like the inquiry into the historic locus of responsibility for functions affected by challenged federal legislation—which is also required by *National League of Cities* and *Hodel*—the determination whether the entity directly regulated shares in the state's sovereignty is necessary to determine "whether the federal regulation affects basic *State* prerogatives in such a way as would be likely to hamper the *[S]tate* government's ability to fulfill its role in the Union and endanger its 'separate and independent existence' " (*United Transportation Union* v. *Long Island R.R.*, No. 80-1925 (Mar. 24, 1982), slip op. 8, quoting *National League of Cities* v. *Usery, supra,* 426 U.S. at 851; emphasis added).

For purposes of discerning the scope of constitutional intergovernmental immunity, the State's election to establish petitioner as a nongovernmental entity was properly given controlling effect by the court of appeals. In choosing to pursue its objectives—however meritorious and important—through a nongovernmental entity, the State should have known that that entity would be subject to federal legislation, including the FLSA. Cf. *United Transportation Union* v. *Long Island R.R., supra*, slip op. 8-12.[6] And no insult to state sovereignty can possibly arise where, as here, the decision to operate petitioner as a private nonprofit corporation was occasioned only by a technicality of state law or policy that is subject to alteration at the instance of the State.[7] See *Richland County Association, For Retarded Citizens* v. *Marshall*, 660 F.2d 388, 390-391 (9th Cir. 1981), vacated and remanded for lack of jurisdiction, 454 U.S. 389 (1982).

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[5] Petitioner incorrectly suggests (Pet. 12) that the actual analysis in *Hodel* indicates that the fact that the regulated entity is not a state or subdivision thereof is not in itself dispositive. The Court's opinion clearly reveals that the private identity of the mining operators directly regulated by the Surface Mining Act was sufficient to dispose of the challenge to that Act to the extent that it was predicated upon the effect of the Act upon surface mine operators. 452 U.S. at 288-289. The balance of the Court's discussion was directed to the separate contention (likewise found wanting) that the indirect effect of the federal statute upon state government itself constituted impermissible regulation of the State.

To be sure, as petitioner argues (Pet. 12), application of the FLSA to nongovernmental entities may influence the decisions of the states respecting the format and organization to be employed in delivering mental health services—

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[6] Petitioner (Pet. 4) and amicus curiae Alabama (Br. 8 n.8) incorrectly suggest that officials of the Department of Labor led them to believe that employees of community mental health centers such as respondent Williams were not, after *National League of Cities*, entitled to receive the federal minimum wage. The correspondence in question (Pet. App. 56a-57a) does not address whether employees of nonprofit nongovernmental centers are exempt from FLSA coverage; the correspondence is clearly directed only to "State and local government employees" (*id.* at 56a).

[7] There is some confusion as to why petitioner was not established as a public instrumentality when it became desirable to separate it from the Jefferson Authority. See page 2, *supra*. Petitioner asserts that state law would not allow its incorporation of a public corporation because of a statutory geographical quota system (Pet. 12). However, the private respondent claims that there was no such statutory impediment (Br. in Opp. 6 n.1), and the court of appeals merely assumed that such an impediment existed despite its uncertainty respecting its source (Pet. App. 6a). Amicus curiae Alabama now reports (Br. 8 & n.7) that the quota rule was merely an administrative policy—albeit of several years' standing. In any event, there is no suggestion whatever that the State of Alabama could not have removed any impediment that existed in state law to operation of the Eastside Center as a public instrumentality independent of the Jefferson Authority, or even that doing so would have compromised any state policy.

i.e., assignment of these responsibilities to the private sector may to some extent be discouraged. But the doctrine of intergovernmental immunity does not free the states from all consequences of their decisions; it merely shields against federal commerce power legislation their "freedom to structure integral operations in areas of traditional governmental functions." *National League of Cities* v. *Usery, supra*, 426 U.S. at 852. Neither the determination of wage rates for employees of a *nongovernmental* entity, nor the decision to allow mental health services to be provided by such an entity, implicates the freedom to structure *integral* government operations.[8] Accordingly, the doctrine of intergovernmental immunity has no application here.

The doctrine of intergovernmental immunity recognizes a narrow exception to the broad authority of Congress in legislating pursuant to the Commerce Clause. See *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc., supra*, 452 U.S. at 286-288. The Fair Labor Standards Act, like every other Act of Congress, comes before the courts cloaked with a strong presumption of constitutionality—except to the extent that this Court's decision in *National League of Cities* indicates that its application is impermissible in defined circumstances. But where, as here, the criteria for immunity recognized by this Court are not met, the considerations of federalism that underlie *National League of Cities* are not implicated. Nothing in *National League of*

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[8] Amici curiae Louisiana, et al. argue (Br. 7-9) that the court of appeals' decision will impair the states' sovereignty by impeding the "deinstitutionalization" movement—the trend away from provision of mental health services through large state hospitals and toward delivery of such services in smaller community settings. But there is no evidence in the record, and amici have pointed to none, that such community treatment centers cannot be operated by public instrumentalities. Nor is there evidence that application of the FLSA to nongovernmental mental health facilities would significantly affect the feasibility of "deinstitutionalization" through private sector facilities.

Cities suggests that a state may extend its own immunity to nongovernmental entities. See *Powell* v. *United States Cartridge Co.,* 339 U.S. 497 (1950) (FLSA applies to employees of government contractor operating under a cost-plus-a-fixed-fee contract with the United States, notwithstanding the statutory exemption for the federal government in the Act);[9] see also *United States* v. *New Mexico,* No. 80-702 (Mar. 24, 1982) (federal government's constitutional immunity from state taxation unavailable to federal contractors); *Washington* v. *Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 150-162 (1980) (Indian tribal exemption from state taxation not available to non-Indian purchasers of commodities produced outside the reservation and imported to be sold to off-reservation purchasers).[10] Where a state elects to allow services to be delivered by a nongovernmental entity, withholding from it the economic advantage that would result from that entity's use of private employees on terms more favorable than those prevailing generally in the private sector cannot be said to infringe the state's sovereignty.

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[9] From the time of its enactment more than 40 years ago, the Fair Labor Standards Act has been applied to private employers under contract with a state, and the courts have consistently rejected the claim that such employers are within the former statutory exemption for "any State or political subdivision of a State" (29 U.S.C. (1964 ed.) 203(d)). See, *e.g.*, *Public Building Authority* v. *Goldberg*, 298 F.2d 367, 369 (5th Cir. 1962); *Walling* v. *McCrady Construction Co.*, 60 F. Supp. 243, 245 (W.D. Pa. 1945), aff'd, 156 F.2d 932, 934 (3d Cir.), cert. denied, 329 U.S. 785 (1946); *Mitchell* v. *Singstad*, 177 F. Supp. 376, 382 (D. Md. 1959); *Walling* v. *New Orleans Private Patrol Service, Inc.*, 57 F. Supp. 143, 148 (E.D. La. 1944); *Walling* v. *Craig*, 53 F. Supp. 479, 483-484 (D. Minn. 1943).

[10] Cf. *Blum* v. *Yaretsky*, No. 80-1952 (June 25, 1982), slip op. 12-18 (transfer of patients by nursing homes regulated and subsidized by state not state action for purposes of Fourteenth Amendment); *Rendell-Baker* v. *Kohn*, No. 80-2102 (June 25, 1982), slip op. 9-13 (discharge of teacher by private school providing education for maladjusted high school students referred by public bodies pursuant to contracts is not action under color of state law for purposes of 42 U.S.C. 1983).

2. Petitioner's quarrel is, to some extent, with the court of appeals' application of the rule limiting intergovernmental immunity from federal commerce power legislation to the particular facts of this case (Pet. 13-17). In short, petitioner believes that the court of appeals has mischaracterized its relationship with the State of Alabama. But this aspect of the court of appeals' decision is essentially fact-bound and presents no question of general importance warranting this Court's review.[11] In any event, the decision of the court of appeals is correct for the reasons sufficiently stated by the court, upon which we rely (see pages 4-5, *supra*; Pet. App. 15a-17a).[12]

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[11] The court of appeals frankly acknowledged "the borderline nature of the facts before" it (Pet. App. 15a) and stressed the fact-bound nature of its ruling (*ibid.*).

[12] Petitioner's contention (Pet. 12-17) that the court of appeals erred by referring to the principles noted in *NLRB* v. *Natural Gas Utility District*, 402 U.S. 600 (1971), is insubstantial. In that case, the Court considered whether an entity constituted a "political subdivision" excluded from the definition of "employer" in the National Labor Relations Act, 29 U.S.C. 152(2). The court of appeals recognized that *NLRB* v. *Natural Gas Utility District* presented only an issue of statutory interpretation, but properly observed that the Court's consideration of the meaning of the term "political subdivision" provided, at the very least, a helpful analogy here (Pet. App. 13a). The analogy is indeed apt because the considerations of federalism that underlie the public employee exception to the NLRA are similar to those that inform this Court's decision in *National League of Cities*. See *NLRB* v. *Natural Gas Utility District*, *supra*, 402 U.S. at 604.

In any event, the court of appeals' conclusion that petitioner is not a political subdivision for intergovernmental immunity purposes is in no sense dependent upon the analogy to the NLRA (see Pet. App. 15a-17a). Nor, contrary to petitioner's suggestion (Pet. 15), did the court of appeals misapply the test borrowed from *NLRB* v. *Natural Gas Utility District*. The first branch of that test stipulates that an entity "created directly by the state *so as to constitute [a] department[] or administrative arm[] of the government*" is a political subdivision. 402 U.S. at 604 (emphasis added). Petitioner simply ignores the italicized language. See Pet. 15. And contrary to petitioner's alternative assertion (Pet. 15-16),

3. Petitioner (Pet. 17-21) and the amici curiae (Alabama Br. 13-19; Louisiana Br. 9-11) seek review, as well, of the suggestion by two members of the panel (see page 6, note 4, *supra*) that, even if petitioner were part of state government, intergovernmental immunity would not shield it from application of the FLSA. There is plainly no occasion to consider that hypothetical question in this case. Cf. *California* v. *Sierra Club*, 451 U.S. 287, 298 (1981). The court of appeals frankly labelled the portion of its opinion touching on that issue as dictum (Pet. App. 18a), and the concurring judge joined in that characterization (*id.* at 20a-21a). This aspect of the court's discussion accordingly is unneccesary to the proper resolution of this lawsuit. As the court below recognized (Pet. App. 18a), there is no reason to decide in this case whether provision of mental health services through halfway houses is a traditional function of state government, or whether application of the FLSA to govern terms of employment in such a facility operated by a state agency would displace fundamental state decisions in a manner irreconcilable with state sovereignty. We note, in addition, that the conflict alleged to exist between the decision of the court below and decisions of other courts of appeals (Pet. 19-21) pertains only to the court of appeals' dictum, and not to the primary basis for the court's ruling.[13]

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the court of appeals did not rely on any single factor in determining that petitioner is not de facto controlled by the State of Alabama or the Jackson Authority—and thus that the second alternative criterion for identifying a political subdivision reflected in *NLRB* v. *Natural Gas Utility District* was not satisfied. See Pet. App. 15a-17a.

[13] The existence of a conflict requiring immediate resolution is in any event doubtful. The soundness of the standard employed by the Sixth Circuit in *Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (1979), upon which petitioner relies, is an open question in light of the intervening decision in *United Transportation Union* v. *Long Island R.R.*, *supra*, which establishes at a minimum that, contrary to the view of the Sixth Circuit (598 F.2d at 1037), the historic locus of a function as public or private is a vital consideration in the intergovernmental immunity

4. Petitioner's final contention (Pet. 23-26) is that the decision of the court of appeals will have a substantial adverse impact upon state mental health systems. Because the decision below dealt only with a state plan to contract out mental health treatment to private entities, that assertion is incorrect. In any event, this Court affirmed in *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra,* that, under *National League of Cities,* "the ultimate

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analysis. *Molina-Estrada* v. *Puerto Rico Highway Authority,* 680 F.2d 841 (1st Cir. 1982), also cited by petitioner, was actually decided on statutory grounds. *Id.* at 846. To be sure, the First Circuit did borrow its analysis from Tenth Amendment cases, particularly the Sixth Circuit's decision in *Amersbach* v. *City of Cleveland, supra,* but the court engaged in no independent analysis of the scope of intergovernmental immunity. Instead, the court explained that "[t]he parties here are apparently willing for us to apply" the *Amersbach* criteria. *Molina-Estrada* v. *Puerto Rico Highway Authority, supra,* 680 F.2d at 845. Finally, even if the alleged conflict (see Pet. 21) between the Fifth Circuit's decision in *NLRB* v. *Highview, Inc.,* 590 F.2d 174, 178 (1979), and the decision below were not purely semantic, review by this Court would not be warranted because the conflict is effectively intra-circuit in nature.

The issue actually decided by the court of appeals has been considered by only one other court of appeals to date, and, as this Court subsequently held, that court had no jurisdiction to do so. As petitioner observes (Pet. 25 n.12), a divided panel of the Ninth Circuit held that intergovernmental immunity from application of the FLSA extends to a private non-profit organization under contract with a state to provide residential care for the mentally retarded. *Richland County Association for Retarded Citizens* v. *Donovan,* 91 Lab. Cas. (CCH) para. 34,018 (1981). Subsequent to the government's filing of a jurisdictional statement in this Court, the Ninth Circuit sua sponte withdrew that opinion and issued a new opinion, 660 F.2d 388 (1981), reaching the opposite conclusion in light of *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra.* This Court vacated the judgment of the court of appeals and both opinions without reaching the merits, because the court of appeals lacked jurisdiction to entertain an appeal from the judgment of the district court holding the FLSA unconstitutional as applied. *Donovan* v. *Richland County Association for Retarded Citizens,* 454 U.S. 389 (1982).

economic impact" of the federal action on a state is not determinative. "[E]ven if it is true that the Act's requirements will have a measurable impact on [the state], this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment." 452 U.S. at 292 n.33.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 82-207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EASTSIDE MENTAL HEALTH CENTER, INC.,
Petitioner,

v.

DAVID R. WILLIAMS,
Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF FOR THE STATE OF ALABAMA AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS* STATE OF ALABAMA 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

- I. THE DECISION BELOW WOULD ALLOW FEDERAL REGULATION TO MATERIALLY AND IMPROPERLY INTRUDE UPON ALABAMA'S SOVEREIGN DECISION-MAKING AUTHORITY 5
  - A. Eastside And Its Employees Are, For Tenth Amendment Purposes, Indistinguishable From Other State Mental Health Centers And Employees 7
  - B. FLSA Regulation Of Eastside Would Result In Unwarranted Federal Dictation of Alabama's Mental Health Policy And Employment Decisions 11
- II. THE DECISION BELOW, BY EFFECTIVELY DISTINGUISHING "MENTAL HEALTH" FROM "PUBLIC HEALTH," IMPROPERLY EXCISES A SIGNIFICANT PORTION OF ALABAMA'S SOVEREIGNTY 12
- III. THE DECISION BELOW JEOPARDIZES ALABAMA'S MENTAL HEALTH PROGRAMS AND OTHER SOCIAL SERVICES 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES: Page

Federal Energy Regulatory Commission v. *Mississippi*, ___ U.S. ___, 102 S. Ct. 2126 (1982) 6, 12

Hodel v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981) 6

Maryland v. *Wirtz*, 392 U.S. 183 (1968) 12

National League of Cities v. *Usery*, 426 U.S. 833 (1976) 3, 4, 5, 6, 8, 11, 12, 13, 16, 19

O'Connor v. *Donaldson*, 422 U.S. 563 (1975) 16

Pennhurst State School & Hospital v. *Halderman*, 451 U.S. 1 (1981) 15

Schweiker v. *Wilson*, 450 U.S. 221 (1981) 16

United Transportation Union v. *Long Island Railroad Co.*, ___ U.S. ___, 102 S. Ct. 1349 (1982) 6

Williams v. *Eastside Mental Health Center, Inc.*, 669 F.2d 671 (11th Cir. 1982) 2, 3, 7, 8, 11, 13, 15

Williams v. *Eastside Mental Health Center, Inc.*, 509 F.Supp. 579 (N.D. Ala. 1980) 3, 8

Wyatt v. *Ireland*, No. 3195-N (M.D. Ala. January 15, 1980) (unpublished order) 18

Wyatt v. *Stickney*, 344 F.Supp. 373 (N.D. Ala. 1972), *aff'd in part and rev'd in part sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (1974) 13, 14, 18

STATUTES:

Fair Labor Standards Act
29 U.S.C. §§ 201, *et seq.* (1976) 2
29 U.S.C. § 216(b) (Supp. IV 1980) 17

Alabama Code
§ 10-3-1 (1975) ("Act 578") 2, 7, 8, 9, 10, 11
§ 22-50-15 (1975) 14
§§ 22-51-1, *et seq.* (1975) ("Act 310") 7, 8, 9, 10, 11

RULES AND REGULATIONS:

29 C.F.R. §§ 785.20, *et seq.* (1980) 3

Table of Authorities Continued

Page

MISCELLANEOUS:

Alabama Department of Mental Health, *Community Mental Health Program Standards* (5th rev. ed. 1981) 9, 10

Alabama Department of Mental Health, *State Mental Health Services Program, FY 1981-82* (Oct. 1, 1981) 2, 7, 10, 14, 17, 18

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BRIEF FOR THE STATE OF ALABAMA AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 36 of this Court's Rules, the State of Alabama, by its Attorney General, submits this brief as *amicus curiae* in support of the petition of Eastside Mental Health Center, Inc. for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered March 5, 1982.

INTEREST OF THE *AMICUS* STATE OF ALABAMA

In 1974, the Alabama Department of Mental Health, operating through the Jefferson-Blount-St. Clair [Counties] Mental Health-Mental Retardation Authority ("Jefferson Authority"), a regional state agency coordinating mental health services in the greater Birmingham metropolitan area, opened the Eastside Mental Health Center ("Eastside") as an unincorporated service unit to provide community mental health services within a "catchment area" or segment of the 3-county metropolitan region. *Williams* v. *Eastside Mental Health Center, Inc.*, 669 F.2d 671, 673 (11th Cir. 1982).[1] In 1975, the Jefferson Authority, for administrative reasons and without changing Eastside's purposes or functions, incorporated Eastside under Alabama Code § 10-3-1, a general non-profit corporations statute. *Id.* at 673-74. Aside from its corporate form, Eastside's structure and role within the State's mental health system also remained unchanged. Today, Eastside continues as one of 24 centers located throughout the State comprising Alabama's community mental health system.

In 1979, Respondent Williams, a former transitional home manager[2] at Eastside, sued Eastside for allegedly unpaid minimum wages and overtime pay assertedly required by the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.* (1976). Williams sought primarily additional overtime pay for portions of his shifts spent sleeping on Eastside's premises, assertedly due under the federal Wage-Hour Division's complex "sleep-time" regulations. *See* 29 C.F.R. §§ 785.20, *et seq.* (1980). The District Court below held that Eastside is not liable for such overtime payments because it is constitutionally immune from FLSA coverage under the Tenth Amendment, as construed and applied in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), and granted summary judgment for Eastside. 509 F.Supp. 579, 579-81 (N.D. Ala. 1980).

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[1] A copy of the opinion below appears in the Appendix ("App.") to Eastside's petition for certiorari ("pet. for cert.") herein, 3a-21a.

[2] The State's transitional home program, operated through Eastside and 11 other community mental health centers, provides up to six months' care for persons who would otherwise enter, and for those who have recently left, state mental health institutions. Home managers like respondent Williams, often college students or recent graduates, provide counselling, guidance and supervision for residents in daily living skills, education, socialization and recreation on rotating shifts, during which the managers live and sleep in the centers. Seven other adult group homes throughout the State provide similar care for periods longer than six months. *See* Alabama Department of Mental Health, *State Mental Health Services Program, FY 1981-82* (Oct. 1, 1981) *("State Program")* at 51-56.

The Court of Appeals reversed, holding that Eastside is not immunized from FLSA coverage under *National League of Cities* because it is not, in the court's view, a "political subdivision" of the State. 669 F.2d at 678. Further, the court below stated that Eastside—and by direct implication *all* of Alabama's community mental health centers—do not perform "integral governmental functions" protected from FLSA regulation by *National League of Cities* and its progeny, apparently distinguishing "mental health" services from "public health" services protected by *National League of Cities*.[3] *Id.* at 680-81.

The consequences for Alabama of these unanticipated and unprecedented rulings are direct and severe. Foremost is the clear impairment of Alabama's ability to structure, administer and operate essential public health programs as it deems most appropriate and efficient. Moreover, as a result of this infringement of its sovereignty, the State faces a potentially enormous, unbudgeted and unfunded back wage liability to many community mental health center employees. That liability would force the State either to reduce significantly the quality and quantity of certain mental health services—including possible elimination of its transitional home program—or else to decrease other social services in order to maintain present mental health programs. This intrusion upon the sovereignty of the State, and the resultant potentially staggering economic burden, establish the clear interest of the State of Alabama in the outcome of this case.

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[3] Suddenly faced with an unanticipated and unprecedented ruling directly jeopardizing its entire community mental health system, Alabama sought, but was denied, intervention as a party, rehearing and rehearing *en banc* below. *See* pet. for cert. at 8, n.6.

SUMMARY OF ARGUMENT

National League of Cities held that Congress' Commerce Clause power may not infringe upon State sovereignty embodied in the Tenth Amendment. The decision below that Eastside—effectively created and administered by the State of Alabama as part of its comprehensive community mental health system—is not constitutionally immune from FLSA regulation clearly conflicts with *National League of Cities* in several significant respects.

First, the holding that Eastside is not protected by *National League of Cities*, because it is not a "political subdivision," results in the virtual dictation by federal wage-hour regulation of state mental health policy and employment decisions, thereby undermining the State's constitutionally-protected sovereignty. *Second*, in stating that Alabama's 24 centers, including Eastside, perform no "integral governmental functions" protected by *National League of Cities*, the decision below carves Alabama's entire community mental health system out of its overall "public health" system for FLSA purposes—with resultant loss of control by the state over employment policies and practices in its community mental health facilities. *Third*, the economic burden on the state of the resultant unanticipated, unbudgeted and unfunded overtime liability will require curtailment or abandonment of important mental health programs, cut-backs in other state social services, or increased state taxes—all resulting from the undue intrusion of federal regulation into Alabama's sovereignty.

In short, the Eleventh Circuit has seized upon an isolated employee's claim for sleep-time pay at one mental health facility, and has converted it, without precedent and without warning, into a pervasive pronouncement applicable to all such facilities, thereby directly jeopardizing the entire state community mental health system—all in derogation of *National League of Cities*. For these reasons, the judgment below should be reversed by this Court.

ARGUMENT

I. THE DECISION BELOW WOULD ALLOW FEDERAL REGULATION TO MATERIALLY AND IMPROPERLY INTRUDE UPON ALABAMA'S SOVEREIGN DECISION-MAKING AUTHORITY.

In *National League of Cities* this Court emphatically reaffirmed the vitality of the Tenth Amendment as the bulwark against federal interference with the States' sovereign decision-making authority. In declaring the very FLSA minimum wage and overtime pay provisions involved herein unconstitutional as applied to state police and fire employees,[4] this Court held that:

> the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to pre-

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[4] One principal issue in *National League of Cities* was the potential FLSA liability arising from the unconventional, often overnight shift schedules of state and local police and fire employees. In this respect, the instant case is strikingly similar, since it involves primarily FLSA sleep-time liability to overnight home managers.

> scribe minimum wage and maximum hours to be paid by the States in their capacities as sovereign governments. In doing so, Congress has sought to wield its power in a fashion which would impair the States' "ability to function effectively in a federal system. . . ." This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. *We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.* [426 U.S. at 852; emphasis added; citation and footnote omitted.]

Here, FLSA regulation of Eastside and Alabama's other mental health centers would "directly displace the State['s] freedom to structure integral operations" regarding traditional and integral public health functions. Thus, *National League of Cities'* theme of the inviolability of state sovereignty was simply disregarded or rejected by the court below.

Because it interposed and utilized the rigid and inapposite two-pronged NLRB "political subdivision" subtest,[5] the Court of Appeals concluded that FLSA regulation of Eastside was not regulation of the "State *qua* State," one of three tests this Court, in recent decisions, has established for invalidating commerce legislation under *National League of Cities. See Federal Energy Regulatory Commission* v. *Mississippi*, ___ U.S. ___, 102 S. Ct. 2126, 2139 n. 28 (1982); *United Transportation Union* v. *Long Island Railroad Co.*, ___ U.S. ___, 102 S. Ct. 1349, 1353 (1982); *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264, 287-

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[5] For the many reasons why imposition of the NLRB "political subdivision" subtest herein is improper as a matter of law, *see* Reason for Granting the Writ I-A, pet. for cert. at 11-17.

88 (1981). By failing to go beyond this threshold "political subdivision" inquiry, the Court of Appeals (a) failed to recognize that, for FLSA and Tenth Amendment purposes, Eastside and its employees are no different from the State's other community mental health centers and employees; and (b) did not properly assess the unwarranted impact of its decision on Alabama's sovereign authority to make mental health policy and employment decisions.

A. Eastside And Its Employees Are, For Tenth Amendment Purposes, Indistinguishable From Other State Mental Health Centers And Employees.

As the court noted below, Alabama's long tradition of providing mental health services to its citizens dates from 1861. 669 F.2d at 673. Under 1967 legislation, Ala. Code §§ 22-51-1, *et seq.* (1975) ("Act 310"), the Department of Mental Health has steadily deinstitutionalized the State's mental health system, primarily to permit as many mentally-ill and retarded persons as possible to pursue relatively normal lives in community centers, separated from those seriously disturbed or violently mentally-ill persons for whom institutionalization cannot be avoided.[6] Since 1974, Eastside has played an integral role in this deinstitutionalization effort, providing a needed treatment environment for thousands of mentally-afflicted persons. Although Eastside is one of three centers incorporated under Alabama's general non-profit corporations statute, Sec. 10-3-1 (1975) ("Act 578"), its operations, employees, and employment practices do not differ from those in the State's other centers which are admittedly "public corporations" under Act 310.

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[6] The Alabama Department of Mental Health has stated in its *State Program* at 22 that:

> [t]he cornerstone of [the State's] philosophy regarding the planning and development of the mental health system is the tenet that *mental health care should be provided in the least restrictive and most humane setting* and in the shortest-term appropriate to the individuals' treatment needs . . . Community care is equal in importance to institutional care in providing [such] services . . . and is inextricable from system planning due to the interrelationship between community and institutional care. [Emphasis added.]

The court below noted that Eastside was formerly an unincorporated service unit of the Jefferson Authority. 669 F.2d at 673. As such, mental health funds awarded by the Jefferson Authority to Eastside gave the impression of the Authority's awarding State funds to itself in competition with two other service agencies within its region. To dispel this impression of apparent "conflict of interest," the Authority incorporated Eastside as a separate entity. *Id.* at 673-74. But this could only be done under Act 578, because, for administrative reasons, the Department of Mental Health has adopted a policy of permitting incorporation of only one "Act 310 Board" per region,[7] and because the Jefferson Authority itself already constituted such an incorporated Board within its 3-county metropolitan region. 660 F.2d at 674 n.3; 509 F. Supp. at 581. Thus, the selection of Act 578 incorporation of Eastside was dictated solely by State administrative reasons and by the absence of any other incorporation mechanism, not by any wage and hour concerns.[8]

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[7] This long-standing policy was adopted in 1969 to permit proper assessment of regional needs, coordination of delivery of community mental health services, and channelling of public funds within each region by one state agency.

[8] Indeed, the State has long assumed that its community mental health facilities are immune from FLSA coverage under *National League of Cities*, based upon letters from the federal Wage and Hour Division confirming such immunity. *See* pet. for cert., App. at 56a, 57a.

Like all of Alabama's centers, Eastside is strictly regulated by the Department of Mental Health under its comprehensive *Community Mental Health Program Standards* (5th rev. ed. 1981). These *Standards* provide in part as follows:

> A community mental health center operates under the auspices of a public non-profit corporation as provided in Act 310 (1967 Alabama Legislature), a *private non-profit corporation* [like Eastside] as provided in Act 578 (1955 Alabama Legislature), or *any other public agency* created by or incorporated under Alabama law. [*Standards* at Sec. 1209; emphasis added.][9]

The *Standards* thus do not themselves distinguish between so-called "public" corporations formed under Act 310, and "private" corporations (including Eastside) formed under Act 578, treating both as "public agencies."

In all other significant respects, Eastside is functionally indistinguishable from the State's Act 310 centers. The administrative mechanism for funding all centers is the same. Budgetary, audit, accounting and other financial requirements are the same for all centers. The mix of programs they provide are dictated by State requirements and by regional needs, and Eastside's programs do not differ from those provided by many other centers. State review and oversight is the same for all centers, and the centers' reporting requirements are identical. Significantly, Eastside's employment policies and practices required by the State's *Standards* do not differ from those of other centers, particularly respecting the transitional home program in which respondent Williams was employed. *See Standards* at §§ 4101-4401; *State Program* at 17-19.

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[9] The *Standards* in effect upon initiation of this litigation in the District Court, and included in briefs below, are reproduced in part in the pet. for cert., App. at 51a-55a. While a new revised edition of the *Standards*, cited here, was subsequently issued, no significant substantive changes relevant hereto have been made.

Indeed, analysis of the transitional home program's employees and employment practices demonstrates how the Eleventh Circuit's distinction between Eastside and other State centers, based upon the "political subdivision" subtest, leads to absurd results. For example, employees hired by Eastside during its prior "unincorporated" stage—when it was unquestionably part of a "public" entity (the Jefferson Authority)—performed the same jobs as those hired during Eastside's later "incorporated" stage. They were all subject to the same employment policies and procedures, including those regarding hours of work, shifts, sleep-time, and calculation of pay and benefits. Indeed, undoubtedly some Eastside employees worked during both the earlier "unincorporated" and later "incorporated" periods. Thus, under the Eleventh Circuit's "political subdivision" distinction, such carryover employees could be due back pay under FLSA for certain periods *after*, but not *before*, Eastside's Act 578 incorporation.

Further, many transitional home managers in "Act 310" centers perform jobs, and are subjected to employment policies and procedures, substantially identical to those applied to respondent Williams at Eastside. But under the Eleventh Circuit's "political subdivision" subtest, only Williams would be due statutory overtime for sleeping on Eastside's premises.

That the foregoing indistinguishable groups of mental health employees should be treated differently for FLSA purposes, merely because of Act 578 incorporation of Eastside, underscores the obvious unworkability of the

Eleventh Circuit's "political subdivision" subtest. The unwarranted and unjustified results of these employee comparisons demonstrate why, as *National League of Cities* and its progeny mandate, the courts must go beyond mere formalistic labels and assess the true impact of federal regulation on the states. Only thus can Tenth Amendment purposes be adequately served and state sovereignty thereby maintained.

B. FLSA Regulation Of Eastside Would Result In Unwarranted Federal Dictation Of Alabama's Mental Health Policy And Employment Decisions.

Notwithstanding the above, the court below concluded that Act 578 incorporation of Eastside removed it from presumptive FLSA immunity:

> For whatever reason, Alabama did not elect to operate Eastside as a state institution with state employees. . . . Whatever may have been the state's reason for doing it this way, it must live with the consequences. It cannot claim an immunity based on a condition which it itself sought to avoid. [669 F.2d at 678.]

But this conclusion is clearly erroneous. *First*, the court's use of the formalistic and superficial "state institution" and "state employees" labels obscures the reality that Eastside is an integral part of "the State" in all practical respects, and that its employees are indistinguishable from "state employees." *Second*, there is no evidence in the Record—and the court below referred to none—that Alabama "sought to avoid" any "condition" affecting Eastside's status as an integral part of the State mental health system. The reason for Act 578 incorporation of Eastside has been explained and, as noted, Alabama draws no distinction between assertedly "private" Act 578 and "public" Act 310 corporations.

Third, and most importantly, the court failed to recognize that the State's ability to determine the structure for delivering social services to its citizens, and to formulate employment policies and practices related thereto, is precisely the reason why Eastside *is* (rather than why it is not) entitled to Tenth Amendment protection herein. That fundamental choice is the very "freedom to structure integral operations in areas of traditional governmental functions" which *National League of Cities* sought to preserve. 426 U.S. at 852. As this Court has recently reiterated: " 'the authority to make . . . fundamental . . . decisions' is perhaps the quintessential attribute of sovereignty. Indeed, having the power to make decisions and set policy is what gives the State its sovereign nature." *Federal Energy Regulatory Commission* v. *Mississippi*, *supra*, 102 S. Ct. at 2138; citations omitted. Thus, the decision below, which fails to respect this "quintessential attribute of sovereignty," must be corrected.

II. THE DECISION BELOW, BY EFFECTIVELY DISTINGUISHING "MENTAL HEALTH" FROM "PUBLIC HEALTH," IMPROPERLY EXCISES A SIGNIFICANT PORTION OF ALABAMA'S SOVEREIGNTY

National League of Cities explicitly overruled *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), which had upheld the constitutionality of application of the very FLSA minimum wage and overtime provisions involved herein to state educational and hospital employees:

> While there are obvious differences between the schools and *hospitals* involved in [*Maryland* v.] *Wirtz*, and the fire and police departments affected here, *each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens*. We are therefore persuaded that *Wirtz*

> must be overruled. [426 U.S. at 855; emphasis added.]

Further, *National League of Cities* declared that "*public health* . . . [is] typical of those [activities] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *Id.* at 851; emphasis added.

The Eleventh Circuit majority[10] simply disregarded all of this, and effectively distinguished, *sub silentio*, "mental health" from "public health" for Tenth Amendment purposes on the unprecedented, undocumented, unsupported and unjustifiable ground that mental health services are not "integral" because they do not "relate to the *entire state populace*" or "produce significant consequences affecting *all persons* in the state." 669 F.2d at 680; emphasis added. This conclusion literally carves out from the State's sovereignty the authority to establish employment policy in an entire field of operations, and subjects those operations to a significant, federally-imposed economic burden.

That this distinction cannot be legally justified is demonstrated in Eastside's petition for certiorari herein at pp. 17-21.[11] But from a purely *practical* standpoint, the distinction is even less tenable.

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[10] Circuit Judge Hill, concurring specially, did not join the majority opinion in this latter respect, indicating he was "presently inclined to the view that such [a mental health] operation [as Eastside] would be exempt." 669 F.2d at 680.

[11] The Court of Appeals cited no authority for its view other than *Webster's New International Dictionary* (1936 ed.). 669 F.2d at 680.

First, the State of Alabama makes no such distinction. The legislature has stated unequivocally in Ala. Code § 22-50-15 (1975) that:

> [a]ny state supported facility under the jurisdiction of the [State Mental Health] board [now Department] providing services requiring on-premises residence of patients, including [Eastside] . . . shall be considered *an essential function of the state*, and funds allocated for the support of said state supported facilities shall not be subject to proration at any time a deficit occurs in the general fund. [Emphasis added.]

And the Department of Mental Health has stated that:

> The continued development of alternative living conditions is critical in providing a continuum of care to the chronically mentally ill. . . . Certainly, residential facilities structured similarly to existing Title XX adult transitional homes and DMH group homes will be of *immediate highest priority* in assuring least restrictive treatment and an unhindered flow of care within the community/hospital continuum. [*State Program* at 56; emphasis added.]

Second, for minimum wage and overtime purposes, the State does not view "public health" employees in other facilities differently from employees in its mental health centers. Shift schedules, sleeping periods, calculation of pay and benefits, and all other terms and conditions of employment are determined for all such employees on the assumption that the detailed FLSA sleep-time and other wage and hour regulations do not apply to them.

Third, in 1972, Alabama's mental health system was described by then District Judge Johnson (later a member of the Court of Appeals majority below) in *Wyatt* v. *Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part* *and rev'd in part on other grounds sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (1974) as follows:

> The Court stresses . . . *the extreme importance and the grave immediacy of the need for proper funding of the State's public mental health facilities.* The responsibility for appropriate funding ultimately must fall, of course, upon the State Legislature and, to a lesser degree, upon the defendant Mental Health Board of Alabama. For the present time, the Court will defer to those bodies in hopes that they will proceed with the realization and understanding that *what is involved in this case is not representative of ordinary governmental functions such as paving roads or maintaining buildings.* Rather, what is so inextricably intertwined with how the Legislature and Mental Health Board respond to the revelations of this litigation is the very preservation of human life and dignity. Not only are the lives of the patients currently confined at Bryce and Searcy [State Hospitals] at stake, but also *at issue are the well-being and security of every citizen of Alabama. As is true in the case of any disease, no one is immune from the peril of mental illness.* [344 F. Supp. at 377-78; emphasis added.]

Thus the Eleventh Circuit's assertion below that Alabama's mental health system merely "addresses a specific problem affecting a limited class of persons within the state," 669 F.2d at 681, simply cannot be reconciled with the more accurate description of the system by Judge Johnson quoted above.

Moreover, Judge Johnson's description in *Wyatt* is fully consistent with passages in recent decisions of this Court arising from cases involving state mental health systems. *See, e.g., Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 16 (1981) ("Because such legislation [as the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§ 6000, *et seq.*] . . . *often intrudes on traditional state authority*, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment" (emphasis added)); *Schweiker* v. *Wilson*, 450 U.S. 221, 236-37 (1981) ("[W]e . . . infer from Congress' deliberate action an intent to further the same subsidiary purpose that lies behind the Medicaid exclusion, which . . . was adopted because *Congress believed the States to have a 'traditional' responsibility to care for those institutionalized in public mental institutions*" (emphasis added; footnote omitted)); *O'Connor* v. *Donaldson*, 422 U.S. 563, 581-82 (1975) (Burger, C.J., concurring) (discussion of the evolving history and prominence of state mental health care).

Finally, regardless of the Eleventh Circuit's prefatory language on this "integral state operation" issue, and no matter how its treatment of that issue may be characterized, clearly the import of the decision below is that there is now in the Eleventh Circuit a distinction between "public health" services, which are protected by *National League of Cities*, and "mental health" services, which are not. As explained *infra*, at 16-19, this "distinction" carries with it devastating monetary and other permanent effects on Alabama's mental health system. Even viewed as *dicta*, the Eleventh Circuit's pronouncement constitutes a patently unprecedented, unauthorized and unconstitutional advisory opinion with potentially catastrophic effects upon state sovereignty. Review and reversal by this Court is warranted accordingly.

III. THE DECISION BELOW JEOPARDIZES ALABAMA'S MENTAL HEALTH PROGRAMS AND OTHER SOCIAL SERVICES

The State of Alabama has estimated that its potential exposure to FLSA minimum wage, sleep-time and other overtime liability arising from the decision below, calculated as of June of 1982, could approximate $700,000.[12] Such liability could be doubled under the FLSA's "liquidated" (double-damages) provision, 29 U.S.C. § 216(b). The resulting approximately $1.4 million liability would actually *exceed the State's $1.38 million budget for all transitional home programs* in its community mental health centers for the current fiscal year.

Thus, the ruling below could result in the forced payment of federal overtime rates to transitional home managers for their sleep-time in amounts requiring possible abandonment of the entire transitional home program. A federal requirement that wages must be paid for sleeping employees would thus deprive Alabama citizens of essential social services—a most unwarranted result which this Court should not permit. And, even if, on remand, the District Court ordered only *prospective* relief, payments to mental health employees at FLSA levels would greatly surpass amounts now budgeted or available therefor.

Under this crushing economic burden, few choices, all unpalatable, would be left to the State. It could attempt to raise taxes to increase revenues for mental health care, or seek increased federal assistance, which is in fact diminishing.[13] Absent increased revenues, the State must either limit or terminate transitional home (or other mental health) programs; decrease the quality and quantity of mental health care generally offered; or shift funding from and thus reduce other social service programs.[14] Alternatively, the centers could decrease the number of mental health employees overall, or significantly alter present work schedules.[15]

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[12] This June, 1982 approximation excludes additional potential liability to the date of any subsequent judgment. Of course, the limitations of FLSA § 216 would also affect the State's ultimate liability.

[13] Eastside's (and the State's other centers') federal funding has been cut by approximately 25% for the new fiscal year beginning October 1, 1982. Henceforth, federal funds will come as "block grants" to Alabama, not as payments directly to Eastside. Thus, there is no guarantee that Eastside will receive any significant federal funds in the future. The Department of Mental Health has noted that "[t]he funding picture for social services at the federal level is bleak." *State Program* at 21. "Potential reductions of federal funds for all Title XX [community mental health] services under the pro-

The result is that increased federal regulation will dramatically and suddenly *dictate* the kind, quality and quantity of mental health and other social services pro-

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posed block-grant mechanism makes even maintenance of transitional homes uncertain." *Id.* at 52. "With reductions in federal funding and maintenance level state funding, CMHC's [Community Mental heath Centers] must increasingly look to local and *private* sources for program support." *Id.* at 77; emphasis added.

[14] Choices affecting the quality and quantity of mental health services are constrained by the continuing oversight and supervision of the United States District Court for the Middle District of Alabama in *Wyatt* v. *Stickney*, 344 F. Supp. 373 and 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd. in part and rev'd in part sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974). *See also Wyatt* v. *Ireland*, No. 3195-N (M.D.Ala. January 15, 1980) (unpublished order). Since that District Court has dictated in detailed fashion the standards of mental health care and treatment minimally acceptable under the federal Constitution, as well as the means to attain such levels, any alteration in the State system required by the ruling below would undoubtedly be subjected to close court scrutiny and possible further litigation.

[15] Any such changes would override the State's policy decisions regarding the number of employees necessary to provide adequate mental health services, and significantly decrease the benefits of the transitional home program. Specifically, the overnight shifts foster a stable environment while greatly enhancing the "homelike" atmosphere of Eastside and other centers. Forced abandonment of such policies to avoid FLSA liability would thus sacrifice perhaps the most beneficial feature of the State's deinstitutionalized mental health system.

vided by the State, and thereby seriously intrude upon the State's sovereignty. In *National League of Cities*, this Court stated in very similar circumstances that:

> [q]uite apart from the substantial costs imposed on the States and their political subdivisions, *the [FLSA] displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require.* The Act, speaking directly to the States *qua* States, requires that they shall pay all but an extremely limited minority of their employees the minimum wage rates currently chosen by Congress. It may well be that as a matter of economic policy it would be desirable that the States, just as private employers, comply with these minimum wage requirements. But *it cannot be gainsaid that the federal requirement directly supplants the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment.* [426 U.S. at 847-48; emphasis added.]

The decision below thus would "force directly upon the States [the federal Government's] choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S. at 855. *National League of Cities* concluded that "such assertions of power, if unchecked, would indeed . . . allow 'the National Government [to] devour the essentials of state sovereignty.' " *Id.*; citation omitted. This Court should not permit that result in this case.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

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No. 82-207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EASTSIDE MENTAL HEALTH CENTER, INC.,
Petitioner,

v.

DAVID R. WILLIAMS,
Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF FOR THE STATES OF LOUISIANA, NEBRASKA, SOUTH CAROLINA AND TEXAS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page
INTEREST OF THE STATE OF LOUISIANA 1
INTEREST OF THE STATE OF NEBRASKA 3
INTEREST OF THE STATE OF SOUTH CAROLINA 4
INTEREST OF THE STATE OF TEXAS 6
ARGUMENT 6
I. THE DECISION BELOW WOULD ALLOW FEDERAL REGULATION TO MATERIALLY INTRUDE UPON THESE STATES' SOVEREIGNTY 6
II. THE DECISION BELOW WOULD MATERIALLY REDUCE THE QUALITY AND QUANTITY OF MENTAL HEALTH SERVICES PROVIDED BY THESE STATES 11
III. THE DECISION BELOW SHOULD BE REVERSED UNDER *NATIONAL LEAGUE OF CITIES* 12
CONCLUSION 13

TABLE OF AUTHORITIES

CASES: Page
Burnham v. *Department of Public Health of Georgia*, 349 F.Supp. 1335 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974) (*per curiam*) 7
Federal Energy Regulatory Commission v. *Mississippi*, ___ U.S. ___, 102 S.Ct. 2126 (1982) 9, 12
Gary W. v. *State of Louisiana*, 437 F.Supp. 1209 (E.D. La. 1976) 2, 7
Hodel v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981) 12
Horacek v. *Exon*, Civ. No. 72-L-299 (D. Neb. October 31, 1975) (unpublished order) 3
Horacek v. *Thone*, Civ. No. 72-L-299 (D. Neb. September 15, 1981) (unpublished order) 7
Maryland v. *Wirtz*, 392 U.S. 183 (1968) 10
National League of Cities v. *Usery*, 426 U.S. 833 (1976) 6, 9, 10, 12
United Transportation Union v. *Long Island Railroad Co.*, ___ U.S. ___, 102 S.Ct. 1349 (1982) 12

Table of Authorities Continued

Page

Wyatt v. *Stickney*, 344 F.Supp. 373 (M.D. Ala. 1972), *aff'd in part and rev'd in part sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974) 7

STATUTES:

FAIR LABOR STANDARDS ACT
29 U.S.C. §§ 201-219 (1976) 2

LOUISIANA REVISED STATUTES
La. Rev. Stat. Ann. §§ 28:200, *et seq.* (Supp. 1982) . 2
La. Rev. Stat. Ann. §§ 28:380, *et seq.* (Supp. 1982) . 2
La. Rev. Stat. Ann. §§ 28:475, 478(b) (Supp. 1982) . 2
La. Rev. Stat. Ann. § 36:258(H) (Supp. 1982) 2
La. Rev. Stat. Ann. § 46:2390 (Supp. 1982) 2

NEBRASKA REVISED STATUTES
Neb. Rev. Stat. §§ 71-5001, *et seq.* (1976) 3
Neb. Rev. Stat. §§ 71-5016, *et seq.* (Supp. 1978) 3
Neb. Rev. Stat. §§ 83-1,141, *et seq.* (1976) 3

SOUTH CAROLINA CODE
S.C. Code §§ 44-15-10, *et seq.* (1976) 4, 5

TEXAS CODE ANNOTATED
Tex. Code Ann. art. 5547-201, Sec. 1.01(b) and (c) (Supp. 1982) 6
Tex. Code Ann. art. 5547-203, Sec. 3.12(c) (Supp. 1982) 6
Tex. Code Ann. art. 5547-204, Sec. 4.01 (Supp. 1982) 6

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BRIEF FOR THE STATES OF LOUISIANA, NEBRASKA, SOUTH CAROLINA AND TEXAS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 36 of this Court's Rules, the States of Louisiana, Nebraska, South Carolina and Texas, by their respective Attorneys General, submit this brief as *amici curiae* in support of the petition of Eastside Mental Health Center, Inc. herein for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered March 5, 1982.

INTEREST OF THE STATE OF LOUISIANA

Louisiana's Department of Health and Human Resources ("Department") administers a comprehensive system of mental health facilities, which the Louisiana legislature has determined to be an integral part of the public health services provided by the State to all of its citizens. *See* La. Rev. Stat. Ann. § 36:258(H) (Supp. 1982). In part due to the urging of the Special Master appointed to oversee implementation of the court order in *Gary W.* v. *State of Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976), the Louisiana legislature has recently authorized and funded new community-based facilities to provide residential mental health and mental retardation services similar to those provided by Alabama's community mental health centers. La. Rev. Stat. §§ 28:200, *et seq.* (Supp. 1982); §§ 28:380, *et seq.*; (Supp. 1982); § 28:475; and § 46:2390 (Supp. 1982). The legislature has specifically provided that it is the "primary endeavor" of the Department "to transfer responsibility for the administration of existing facilities or [new] facilities . . . to local associations, *nonprofit corporations*, police juries [counties], school boards, municipalities, or *other public agencies*" providing mental health services. *Id.* § 28:201 (emphasis added).

Thus, Louisiana's new deinstitutionalized, decentralized, community-based mental health services will be provided through programs operated by or under the direction of the Department in public as well as privately-owned non-profit facilities operating under comprehensive and strict State regulation. *Id.* § 28:203; *see also* § 28:478(b) (Supp. 1982).

Given the diminishing mental health budgets of the State and of certain private non-profit providers of mental health services, and given the unconventional shift schedules of many mental health employees, strict regulation of wage and hour practices under the Fair Labor Standards Act ("FLSA") at the aforementioned facilities would require the State to abandon or to severely limit certain needed programs, and force certain private non-profit organizations to cease (or never commence) providing mental health services on behalf of the State. Louisiana's efforts to implement the desired deinstitutionalization will be thwarted thereby.

Thus, rulings such as those of the Eleventh Circuit below would dictate — and significantly reduce — the quality and quantity of Louisiana's community mental health and related services.

INTEREST OF THE STATE OF NEBRASKA

Nebraska operates a comprehensive and regionalized mental health system which makes available to all Nebraska citizens extensive care and treatment for mental illness, mental retardation, and drug and alcohol abuse. Neb. Rev. Stat. §§ 71-5001, *et seq.* (1976); §§ 71-5016, *et seq.* (Supp. 1978); and §§ 83-1,141, *et seq.* (1976). The Nebraska legislature has announced that it is "the public policy of the State of Nebraska that *all persons* residing in Nebraska shall have access to mental health facilities, programs, and services." Sec. 5001, *supra* (emphasis added). The Governor of Nebraska has designated a Coordinator of Human Services to oversee the activities of the Department of Public Institutions, which administers mental health services, the Department of Health, and four other State agencies providing related social services. Nebraska thus considers mental health services to be as essential and "integral" to the State as other public health services.

As part of the overall deinstitutionalization and decentralization of the State's mental health system, accelerated by the Consent Decree entered in *Horacek* v. *Exon*, Civ. No. 72-L-299 (D. Neb. October 31, 1975) (unpublished order), the Nebraska legislature has provided that county and local governments may enter into "interlocal cooperative agreements" to provide community-based residential mental health and related services through regional governing boards and subordinate state and private non-profit facilities. *See* Neb. Rev. Stat. §§ 71-5004 to -5009. These latter community-based facilities are similar in many respects to Alabama's community mental health centers. Their employees work unconventional shifts and often sleep on the premises. Although they are paid for any nighttime interruptions, they are generally not paid for time spent actually sleeping.

Imposition of FLSA liability upon Nebraska's mental health system would significantly dictate the future operations of, and employment practices at, these local facilities. The resulting increased cost of operating these facilities would require limitations on, and perhaps even abandonment of, certain important community mental health programs in Nebraska.

INTEREST OF THE STATE OF SOUTH CAROLINA

In addition to its six major residential institutions, the South Carolina Department of Mental Health operates seventeen major community mental health centers located throughout the State, pursuant to S.C. Code §§ 44-15-10, *et seq.* (1976).

In 1981, one center located in Greenville, South Carolina, established a private, non-profit corporation called the Piedmont Treatment Home for Adolescents, Inc., to provide residential mental health services for emotionally-disturbed adolescents. The non-profit corporation opened its first home in 1981 for boys, and is currently negotiating with the State to open a home for girls. Piedmont's primary funding is provided directly by the Department of Mental Health, which also regulates Piedmont's operations according to strict State standards. S.C. Code § 44-15-80 (Supp. 1981). The legislature has authorized the funding of mental health programs operated by local governments, "political subdivisions . . . or any *non-profit corporation. . . .*" (Emphasis added). Sec. 44-15-20; *see also* Sec. 44-15-30 to -50.

By 1987, the Department of Mental Health plans to open seventeen similar treatment homes for children, which will employ a total of 102 people. Additionally, plans are being formulated to use this same community-oriented model for the deinstitutionalization of, and provision of community residential care and treatment for, hundreds of adult chronically mentally-ill patients who are currently institutionalized.

Application of the FLSA to South Carolina's community mental health facilities, such as the Piedmont Treatment Home and similar planned facilities, would threaten the Department's deinstitutionalization movement and its ability to operate small residential community units to provide needed mental health services. Federal wage-hour regulation would thus interfere with South Carolina's sovereign authority to decide how best to deliver mental health services to all of its citizens.

Finally, application to South Carolina's mental health system of the Eleventh Circuit's conclusion that state mental health facilities do not serve an "integral governmental function," and thus are subject to FLSA regulation, would directly threaten the future course and viability of *all* State mental health facilities. South Carolina believes that it should be allowed the flexibility to develop a mental health care delivery system best suited to the needs and resources of the State. That flexibility would be largely destroyed by imposition of FLSA liability upon the State's mental health system.

INTEREST OF THE STATE OF TEXAS

Texas has long provided a variety of mental health and related services through public and private non-profit agencies at various levels.[1] While Texas believes it compensates its approximately 10,000 mental health employees adequately, it has long assumed that its many mental health facilities and their employees are immune from FLSA regulation under *National League of Cities*, 426 U.S. 833 (1976).

Texas' budget for mental health services has not provided for increased operating costs arising from significant FLSA liability. Therefore, imposition upon Texas' mental health facilities of rulings such as those below—particularly the ruling that mental health facilities do not serve an "integral state function"—would be devastating to the State's efforts to provide a comprehensive and effective mental health system.

ARGUMENT

I. The Decision Below Would Allow Federal Regulation To Materially Intrude Upon These States' Sovereignty

The common concern of these *amici* States can be simply put: application to them of rulings such as those below would result in significant interference with their decision-making authority regarding state mental health policy; require substantial restructuring of their present and proposed community mental health care delivery systems; cause significant decreases in the quality and quantity of state mental health services provided or to be provided; and necessitate major alterations in employment policies and practices affecting many mental health employees in these States.

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[1] The Texas legislature has recently stated that "it is the policy of [the] State [of Texas] that when appropriate and feasible, mentally ill and mentally retarded persons shall be afforded treatment in their own communities." Tex. Code Ann. art. 5547-201, Sec. 1.01(c)(Supp. 1982). Such services are to be provided by "local agencies and private organizations", *id.* Sec. 1.01(b), "consistent with rules, regulations and standards of the [D]epartment [of Mental Health and Mental Retardation]. . . ." Art. 5547-203, Sec. 3.12(c); *see* art. 5547-204, Sec. 4.01 (Supp. 1982).

Moreover, the sudden, unanticipated and unbudgeted imposition of federal wage and hour liability upon these States' community mental health systems would dictate wholesale changes in the manner in which mental health services are provided. These States' budgets for such services are comparatively small, while their potential liability for FLSA minimum wage and overtime pay is very large. Steadily-diminishing state and federal funds cannot be readily shifted from other social service programs to mental health programs — certainly not without corresponding cut-backs in such other programs.

Although these States' community mental health systems are not identical to each other's or to Alabama's, they share with Alabama's the common characteristic of increasing deinstitutionalization and decentralization of programs and facilities. Evolving enlightenment regarding the true capabilities and needs of many mentally-ill and mentally-retarded persons, and increased awareness[2] of the deleterious effects of centralized institutionalization of such persons together with seriously disturbed mentally-ill persons, have led these States (and many others) to decentralize their mental health systems generally. Their goal is to allow as many socially functional mentally-afflicted persons as possible to live in residential mental health centers or group homes (or their equivalents), where they can lead relatively normal lives.

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[2] This awareness has developed in part as a result of litigation in several states, commenced by mental health interest groups and others, designed in part to achieve deinstitutionalization of state mental health systems. *See, e.g., Gary W.* v. *State of Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976); *Horacek* v. *Thone*, Civ. No. 72-L-299 (D. Neb. September 15, 1981) (unpublished order); *Burnham* v. *Department of Public Health of Georgia*, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974) *(per curiam)*; *Wyatt* v. *Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part and rev'd in part sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

A consensus has arisen that this movement away from cloistered institutionalization and toward community integration of mentally-afflicted persons marks the most fundamental and positive change in mental health care theory and practice in this century. However, it entails significant diseconomies of scale and administration, due to the resulting proliferation of community mental health facilities and employees required to provide such fragmented services. Like most States, these *amici curiae* do not presently own or control sufficient numbers of small residential facilities suitable for group home settings. Thus, like Alabama, facilities (or portions thereof) such as nursing homes, hospitals or former personal residences are often leased or otherwise occupied for state use. In some cases, facilities or programs owned or operated by private non-profit organizations[3] have been adapted to state use, where that is the most efficient and cost-effective means of providing community mental health services.

Use of facilities and programs owned by private non-profit organizations will continue for some time, due primarily to the States' inability to bear the sky-rocketing costs of building or purchasing, and maintaining large numbers of new small facilities.

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[3] *E.g.*, the Volunteers of America, Salvation Army, United Way agencies, and similar non-profit groups devoted to providing social services for needy persons.

Thus, the decision of the Court of Appeals below, with its wholesale application of FLSA regulation to virtually all facilities not actually owned by the States, threatens to stifle—and possibly to reverse—the salutary deinstitutionalization movement. Faced with the alternative of maintaining outmoded and crowded centralized institutions and programs, or incurring prohibitive FLSA liabilities through deinstitutionalization, many States will, regrettably, be forced to remain as centralized as possible as a result of the decision below.

The resulting interference of FLSA regulation with the States' sovereign authority to decide how they can best deliver mental health services would constitute the very "displace[ment of] the States' freedom to structure integral operations in areas of traditional governmental functions" which this Court sought to prevent in *National League of Cities* v. *Usery*, 426 U.S. at 852. These States heartily agree with this Court that " 'the authority to make . . . fundamental . . . decisions' " such as this is "perhaps the quintessential attribute of sovereignty. Indeed, having the power to make decisions and set policy is what gives the State its sovereign nature." *Federal Energy Reg. Comm.* v. *Mississippi*, ____ U.S. ____, 102 S.Ct. 2126, 2138 (1982) ("*FERC* v. *Mississippi*"). Yet the decision below would, in many respects, destroy that very "quintessential attribute of sovereignty."

Further, the Eleventh Circuit's unanticipated and unprecedented conclusion that State mental health facilities serve no "integral governmental function" presents a direct threat to the continued operation of *all* such facilities. Under that view even *re*centralization of all facilities and *re*institutionalization of all patients would not necessarily immunize state mental health facilities from the burden of FLSA regulation.

Certainly none of these States regards provision of mental health services to be any less important or "integral" than provision of other forms of "public health" services protected by *National League of Cities'* overruling of *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), and by the former decision's designation of "public health" as one of the demonstrably "integral" state functions immunized from FLSA regulation by the Tenth Amendment. Indeed, these States have long considered their mental health programs to be integral parts of their overall "public health" systems.

Since State mental health services, like other public health services, are available to all citizens of the States, the Eleventh Circuit's articulation of what petitioner herein has aptly referred to as the "100% impact" test to distinguish "mental health" from "public health" simply misses the mark. Obviously, the police and fire services involved in *National League of Cities* are not utilized by *all* citizens, and are never utilized by many during their lives. The same is true of the hospital services involved in *Maryland* v. *Wirtz*, *supra*. The point is that such services—like mental health services—are always *available* to all citizens of the States.

Moreover, distinguishing "mental" from other "public" health facilities would generate absurd results. Into which arbitrary category falls care for *senile* persons—suffering from purely "physical" deterioration—who are often treated in facilities providing "mental health" services? Under the Eleventh Circuit's distinction, where does treatment for alcoholism fall? Or epilepsy?

In short, the Eleventh Circuit's decision would force these States to restructure their mental health care delivery systems, and to make artificial and unsupportable distinctions between "mental health" and other "public health" programs, merely to avoid imposition of significant federal FLSA liability. There could be no clearer example of direct and improper federal intrusion upon State sovereignty.

II. The Decision Below Would Materially Reduce The Quality And Quantity Of Mental Health Services Provided By These States

Both State and federal funds for mental health programs have been steadily diminishing during the past several years, despite growing awareness of the need for improvements in the quality and quantity of such services. At the federal level, significant cut-backs in revenue-sharing funds and the shift from federal grants for specific purposes, once enjoyed by state mental health facilities, to block grants, which may be utilized for purposes other than community mental health care, has resulted (or will result) in an overall decrease in federal support for state mental health systems.[4] Moreover, many States, which are absorbing increasingly greater responsibilities for provision of social and other services to their citizens, have had to steadily reduce their overall mental health budgets either absolutely or in comparison with other expenditures.

Even if federal and state funding continued at present levels, imposition of FLSA liability on state mental health systems would seriously affect the quality and quantity of their services. For example, South Carolina, which is contemplating expansion of its new program of residential care for emotionally-disturbed children, may be faced with a decision similar to that faced by state and local governments in *National League of Cities—i.e.*, "whether to eliminate the program entirely or to substantially reduce its beneficial aspects" as a result of potential FLSA liability. *Id.* at 847.

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[4] For example, federal funding for Nebraska's community mental health centers is projected to decrease from approximately $2.9 million in FY 1981 to approximately $920,000 in FY 1984.

Thus, imposition of FLSA liability on these States' community mental health systems would cause a "significant impact on the functioning of the governmental bodies involved," *id.* at 846—*i.e.*, the very "forced relinquishment of important governmental activities" which *National League of Cities* sought to prevent. *Id.* at 847.

III. The Decision Below Should Be Reversed Under National League Of Cities

The factual setting of this case and the potential direct impact on these States of FLSA liability—unlike the more diffuse effects of federal regulation in *United Transportation Union* v. *Long Island Railroad Co.*, ____ U.S. ____, 102 S. Ct. 1349 (1982); *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981); and *FERC* v. *Mississippi, supra*—are very similar to those in *National League of Cities.* There, as here, the issue was whether FLSA minimum wage and overtime regulation of state programs—and the resulting interference with state decision-making authority regarding policy and employment decisions—offended the Tenth Amendment:

> *One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work and what compensation will be provided where these employees may be called upon to work overtime.* The question we must resolve here, then, is whether these determinations are " 'functions essential to separate and independent ex-

> istence,' " . . . so that Congress may not abrogate the States' otherwise plenary authority to make them. [*Id.* at 846; emphasis added.]

And there the Court reached a conclusion which should be reached in this case:

> If Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' " 'separate and independent existence.' " *Coyle*, 221 U.S. at 580, 55 L.Ed. 853, 31 S.Ct. 688. Thus, even if appellants may have overestimated the effect which the Act will have upon the current levels and patterns of governmental activity, *the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments. In so doing, Congress has sought to wield its power in a fashion that would impair the States' "ability to function effectively in a federal system," Fry*, 421 U.S. at 547 n.7, 44 L.Ed.2d 363, 95 S.Ct. 1792. This exercise of congressional authority *does not comport with the féderal system of government embodied in the Constitution.* [*Id.* at 851; emphasis added.]

CONCLUSION

For the reasons set forth above, these States as *amici curiae* urge this Court to grant the petition for certiorari.

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